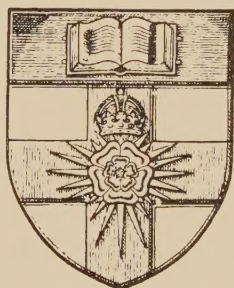


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26	2 of title	<i>Burrows v. The Company</i>	<i>Burrows' Claim</i>
„	3 from bottom	delete "official receiver, who was the"	
27	2	The order made	An order made by the registrar on appeal
„	7	liquidator	registrar
„	„	insurance company	employers' company
43	between lines 11 and 12 insert <i>G. H. Allen</i> , for the trustees of the will.		
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CASES
 DETERMINED BY THE
 CHANCERY DIVISION
 AND IN
 LUNACY
 AND ON APPEAL THEREFROM IN THE
 COURT OF APPEAL.

GENDERS *v.* LONDON COUNTY COUNCIL.

[1914 G. 990.]

C. A.

1914

Oct. 13, 22.

Injunction—Lands Clauses Acts—Compulsory Purchase—Special Act—Provision against Interference with Main Structure of Building—“Take or interfere with”—Destruction of Access to Church—London County Council (Tramways and Improvements) Act, 1913 (3 & 4 Geo. 5, c. cii.), s. 18.

By s. 18 of the London County Council (Tramways and Improvements) Act, 1913, which incorporated the Lands Clauses Consolidation Act, 1845, the defendants were authorized to take the parts of the several properties shown on the deposited plans and scheduled to the Act, comprising (*inter alia*) “forecourt, walls, gates, and railings” of the East Hill Baptist Church, Wandsworth, which lay within the line marked “limits of deviation,” or such part thereof as they might require, without being required or compellable to purchase any greater part or the whole of any such property, “provided that this section shall not entitle the council to take or interfere with the main structure of any house, building, or manufactory.” On March 18, 1914, the defendants served notice to treat in respect of the lands scheduled to the Act.

It appeared that the defendants proposed to take practically the whole of the forecourt in front of the church, the entrance to which was through the forecourt by a flight of stone steps in the centre of the front of the building, and by two flights of steps at each front corner which gave access to galleries. The result would be that the roadway would be brought to within ten inches of the central flight of steps by which the church was entered, and, as East Hill itself was a steep incline, it would be impossible to enter the church or the school buildings in the rear of the church without effecting extensive alterations

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in the main structure. The trustees of the church were willing and able to sell the whole of the buildings. They served notice on the council requiring them "to purchase and take the whole of the said chapel or other building," and moved to restrain them from entering on the land in question or any part thereof and from taking proceedings to obtain possession thereof, or any further steps to assess the value thereof, until judgment or further order. By their writ they also asked for a declaration that the council were not entitled to acquire the property compulsorily without also taking the chapel building and other lands and appurtenances adjoining the same belonging to the plaintiffs:—

Held, affirming the decision of Joyce J., that the proposed operations of the council would interfere with the main structure of the building within the meaning of the proviso to s. 18 of the special Act, and that they were not entitled to take part only of the property.

APPEAL from a decision of Joyce J.

By the London County Council (Tramways and Improvements) Act, 1913 (3 & 4 Geo. 5, c. cii.), which incorporated the Lands Clauses Acts, the council were authorized by s. 11 to do certain works, and by s. 15 "the council may enter upon take and use all or any of the lands shown on the deposited plans and described in the deposited book of reference which they may require for the purposes of the works" By s. 18 it was provided that "The council may in connexion with the works or otherwise in exercise of the powers of this Act take the parts of the several properties shown on the deposited plans and described in the deposited book of reference under the numbers stated in the Third Schedule to this Act which lie within the line marked limits of deviation' or such part thereof as they may require without being required or compellable to purchase any greater part or the whole of any such property: Provided that this section shall not entitle the council to take or interfere with the main structure of any house building or manufactory"

Sched. III., No. 23, described the property the subject of the action under the heading "Description of properties of which portions only are required to be taken by the council. . . . No. 23. Forecourt walls gates and railings."

The plaintiffs were the trustees of a Baptist chapel on the north side of East Hill, Wandsworth. The council, with a view to widening the street, gave them notice to treat with regard to the "forecourt walls gates and railings only," and the plaintiffs,

who were willing and able to sell the whole of the buildings, gave a counter-notice requiring the council "to purchase and take the whole of the said chapel or other building." They moved to restrain the council from entering on the land in question or any part thereof and from taking proceedings to obtain possession thereof, or any further steps to assess the value thereof, until judgment or further order. By their writ they also asked for a declaration that the council were not entitled to compulsorily acquire the property without also taking the chapel building and other lands and appurtenances adjoining the same belonging to the plaintiffs.

The position of the chapel buildings and the effect which the council's works would have upon them were described by Swinfen Eady L.J. as follows:—

The chapel is a building with three entrances, each fronting on East Hill, one in the centre, and one at each end of the east and west front corners. The thoroughfare known as East Hill slopes downwards from east to west and also slopes steeply from north to south. There is at present immediately in front of the building and enclosed by a dwarf wall and railings a level forecourt along the entire width, with a depth of from 15 feet 6 inches to 14 feet 5 inches. The chapel is entered off this forecourt by a flight of stone steps in the centre, and by two flights of steps at either corner, which also give access to the galleries. In the rear of the chapel are separate school buildings approached by passages on either side of the chapel. The incline of East Hill is so steep that on the present line of frontage the level of the forecourt at the west end is about 3 feet 9 inches above the level of the pavement. The notice to treat, which defines the land to be taken by means of a plan, extends to take away nearly the whole of the forecourt along the entire line of frontage, and this will bring the highway to within about nine inches of the centre flight of steps, leaving scarcely room for a retaining wall and railings in front of the chapel, and entirely blocking the approaches to the two corner entrances from the present centre gateway. If the land comprised in the notice to treat be taken, it will be impossible to gain access to the chapel without making extensive alterations to the main structure. Indeed the entrance at the west end will be

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entirely destroyed. The line of widening of the street on either side of the chapel building is some four feet deeper than the front of the building, so that the chapel will be left projecting into the pavement, and there will thus be no room for improving the entrances from the street. It has not been disputed that if the defendants take only the strip, considerable alterations in the main chapel building to make it accessible will thereby be rendered necessary; indeed the council's valuer submitted a scheme of suggested alterations, and agreed that the question of what rearrangements could be made was a difficult one.

Joyce J. held that the proposed operations of the council would interfere with the main structure of the building within the meaning of the proviso to s. 18 and granted an interlocutory injunction.

The council appealed.

Tomlin, K.C., and *T. H. Attwater*, for the appellants. Under s. 18 of the local Act of 1913 the council can take part of a property without the vendor being able to insist under s. 92 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), on their taking the whole. The question is whether the proviso to s. 18 has the effect of compelling them to take the whole of this chapel and buildings notwithstanding that the Act authorizes them in express terms to take part only. It is submitted that the words of the proviso do not cover this transaction. It is clear that no part of the main structure is being taken; and we contend that it is not interfered with within the proviso. Acquiring a title to land cannot be an interference with buildings on the land. The proviso contemplates physical interference with the building. No doubt it is difficult to suggest a physical interference which would not be a taking, but an interference by the works when completed with the use and enjoyment of the building is not enough. If the judgment of Joyce J. is right, none of the properties specified in the Third Schedule to the local Act can be taken in part only and the Act becomes a dead letter. The difference in levels which will be caused by the works is only a subject of compensation; it is no ground for making the council take the whole property: *Moore v. Great*

Southern and Western Ry. Co. (1) Until the works are finished it cannot be said that the main structure is interfered with.

Hughes, K.C., and *W. M. Spence*, for the respondents. The council cannot take advantage of s. 18, for their proposed works must be an interference with the main structure within the proviso. Even if the change of title did not affect our building we should be left, until the works were completed, with a building facing on to a strip of land to which we had no right of access. "Taking" includes execution of the works; it is only in connection with the works that the council have the power to purchase. Owners cannot be called upon to wait to see how works will turn out.

Tomlin, K.C., in reply.

Cur. adv. vult.

Oct. 22. LORD COZENS-HARDY M.R. stated the facts and said that it was clear that under s. 92 of the Lands Clauses Act, 1845, the council could not by virtue of s. 15 of the local Act take a part only of any building if the owners were able and willing to sell the whole. His Lordship continued: It was argued on behalf of the county council that s. 18 only applies to the taking of land and has no reference to the works to be executed after it is taken. In my opinion this is an impossible contention. It is only "in connexion with the works" that the council can do anything under s. 18. The council can only enter upon, take, and use the lands for the purposes of the works. What then is the meaning of the proviso in s. 18? It is urged that the council do not propose to take any part of the main structure of the building. I assume this to be so, and it is urged that there can be no "interference" within the meaning of the Act except a physical interference. The ingenuity of the learned counsel who argued for the appellants could not suggest any case of interference otherwise than by taking a part of the structure. This seems to me to be inconsistent with the proviso. The council must not take any part of the main structure of the building, nor must they, without taking the main structure or any part of it, interfere with it. In my opinion on the facts of

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this case it is hard to imagine a more clear case of interference. The chapel cannot really be used without remodelling or reconstruction if the works proposed are carried out. It not merely destroys the present access to the chapel, but it leaves no reasonable mode by which a new access can be obtained. In my opinion the present case is excluded from s. 18. The council must act upon s. 15, and s. 92 of the Lands Clauses Act is applicable. This was the view taken by Joyce J. on the motion now under appeal. The parties, being reasonable, agreed that this appeal should be treated as the trial of the action, the facts not being in dispute. The result is that there must be judgment in the usual form applicable to the circumstances. There must be a declaration that the defendants are not entitled to take the portion of the plaintiffs' chapel specified in the notice to treat without taking the whole, and an injunction as asked by the writ. The defendants must pay the costs of the action, including the costs of the motion.

KENNEDY L.J. stated the facts and continued: The question which this Court has to decide turns upon the construction of s. 18 of the Act of Parliament, read in conjunction with the Third Schedule to the Act. Put shortly, that question is, Can the council for the widening of the street take the forecourt, walls, gates, and railings which I have already described without also taking the chapel which is the main structure, but paying of course compensation for injuriously affecting the rest of the plaintiffs' property under the provisions of the Lands Clauses Consolidation Act, 1845; or, as the respondents contend, is the council debarred from doing so because the taking of the forecourt, walls, gates, and railings would constitute an "interference" with the main structure of the chapel? The 18th section runs thus: [His Lordship read it.] The words of the Third Schedule in relation to the property in question are "Forecourt walls gates and railings."

It is argued by the learned counsel for the appellants, the London County Council, that the proviso with which s. 18 concludes, and but for which the council would, under the earlier part of the section, be entitled to take the forecourt, walls, gates,

and railings without being required or compellable to purchase any greater part or the whole of the property of the respondents, has no application. That which is scheduled certainly does not include any part of the main structure, the chapel itself. The question which the judge has answered in favour of the respondents is, Does not the council, if it takes the scheduled property, "interfere with" the main structure of the chapel, and so come within the proviso? The question, said the learned judge in the Court below, is one which some persons might answer in the affirmative and others in the negative. His own judgment, however, was in the affirmative, and I have come to the conclusion that that judgment was right. I concede to the appellants that the words "interfere with the main structure of any building" do appear to favour, to some extent, the appellants' contention, because they are, I think, rather more appropriate to some act which interferes physically, if I may use the term, with the building itself, rather than to an act which interferes, as the taking of the forecourt, walls, gates, and railings must do, not physically with the building, but with the access and egress of persons entering or leaving the chapel, and so with the safety and comfort of those who use the building. But, on the other hand, it is difficult (I think, after having asked in vain the learned counsel for the appellants for an instance, I may fairly say, with Joyce J., impossible) to find, according to the appellants' contention, an interference which would not also involve a "taking"; and the proviso clearly contemplates as distinct operations something which is an "interference" and something which is a "taking." The "interference" in the present case is certainly not merely the lessening of the amenity or of the comeliness of the chapel. Apart from the impossibility of maintaining the protection of railings, which the closeness of the new pavement to the chapel steps will prevent, there will, on account of the precipitous drop from the lowest of the steps to the level of the new pavement, be involved, in order to enable chapel-goers to use the chapel, the necessity of considerable alteration in the structure of the basement of that main building. It seems to me that if the council does that which necessitates, in order that the main structure of the building may continue to be used, a

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substantial alteration in that structure itself, it may not unreasonably be held by so doing to "interfere" with that main structure. This being so, and bearing also in mind, upon the question of construction, the fact, which I have already mentioned, that the appellants have been unable to suggest, on their view, any physical interference with the main structure which would not also be a taking, I am of opinion that the respondents are right and that this appeal fails.

SWINFEN EADY L.J. (after stating the facts). The council's contention on the hearing of this appeal was that, according to the true construction of the proviso in s. 18, they were entitled to take a part, unless the part so taken actually included a portion of the main structure of a house, building, or manufactory. But that construction omits to give any effect to the words "or interfere with," and counsel for the appellants was quite unable in this Court, as in the Court below, to give any instance of what, on his construction of the Act, would be an interference with the main building which did not involve taking a part of it.

In construing this s. 18, it must be borne in mind that the section does not absolutely authorize taking the parts mentioned in the Third Schedule, but only subject to the proviso. In various instances, the Third Schedule actually comprises parts of the main structure of buildings, as in the case of the town hall, and in such cases the council certainly could not proceed adversely to take the part only.

In my opinion the plaintiffs' main building would be "interfered with" by what the county council propose to do, and the judgment of Joyce J. was right, and this appeal fails.

Appeal dismissed.

[It was agreed that a declaration would be sufficient without an injunction.]

Solicitors: *Edward Tanner ; G. & M. Goodman.*

H. C. B.

In re TRAFFORD'S SETTLED ESTATES.

WARRINGTON J.

[1914 T. 1048.]

1914

Oct. 14, 16.

Settled Land—Will settling Land and charging Annuities thereon—“Settlement”—Subsisting Annuities—Execution of Disentailing Deed by Tenant in Tail—Resettlement of Part of Settled Land—Powers of Tenant for Life—Compound Settlement—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2, sub-s. 1; s. 50, sub-s. 1; s. 58.

A disentailing deed executed by a tenant in tail in possession of settled land is not an “assignment, by operation of law or otherwise, of his estate or interest under the settlement” within the meaning of s. 50, sub-s. 1, of the Settled Land Act, 1882.

The words “stands for the time being limited to or in trust for any persons by way of succession” in s. 2, sub-s. 1, of the Act of 1882 include the case of annuities charged on the settled land followed by subsequent limitations although not secured by any term or trust.

E. W. T. by his will, dated in 1889, devised certain freehold estates to the use of his son E. S. T. for life and from and after the decease of E. S. T. to the use of his first and other sons successively, according to their respective seniorities, in tail male with remainders over, and he charged his settled estates with the payment of certain annuities, some of which were still subsisting. E. W. T. died in 1892. E. S. T., the tenant for life, died in 1912, and his eldest son, S. W. J. T., thereupon became tenant in tail in possession of the settled estates. On April 8, 1914, S. W. J. T. executed a disentailing deed, which was duly enrolled, limiting the settled estates to his own use in fee simple. On April 17, 1914, he executed a resettlement on his marriage of a part of the estates originally settled by the will to the use of himself for life with remainders over:—

Held, that S. W. J. T., having ceased to be tenant in tail of the estates not comprised in the resettlement, could no longer exercise the powers of a tenant for life in respect of them.

Held, also, as regarded the estates comprised in the resettlement, that by reason of the subsistence of the annuities there was a compound settlement consisting of the will, the disentailing deed, and the resettlement, although there was no term limited to secure them nor any trust for their payment.

In re Marquis of Ailesbury and Lord Iveagh [1893] 2 Ch. 345 and *In re Phillimore's Estate* [1904] 2 Ch. 460 applied.

ADJOURNED SUMMONS.

Edward William Trafford by his will, dated March 4, 1889, devised and settled his freehold lands and hereditaments in the counties of Norfolk, Cambridge, and Lincoln, thereafter

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designated his devised and settled estates, to the use of his son Edward Southwell Trafford for life, and from and after his decease to the use of the first and other sons of E. S. Trafford successively, according to their respective seniorities, in tail male, with remainders over. And the testator charged his devised and settled estates with the payment of certain annuities, some of which were still subsisting.

The testator made a second codicil to his will, dated March 11, 1889, by which he gave certain powers of appointing jointures out of and granting leases of his devised and settled estates.

The testator died on February 28, 1892.

E. S. Trafford, the tenant for life, died on August 2, 1912, and thereupon his eldest son, Sigismund William Joseph Trafford, became tenant in tail in possession of the settled estates.

On April 8, 1914, S. W. J. Trafford executed a disentailing deed, which was duly enrolled on the following day, whereby the settled estates were disentailed and limited to his own use in fee simple.

By a settlement dated April 17, 1914, and made on the marriage of S. W. J. Trafford, part of the estates originally settled by the will and codicil were resettled by him to the use of himself during his life with remainder to uses for securing a jointure to his intended wife with remainder to trustees for a term of 600 years for securing portions for younger children with remainder to the use of the first and every other son successively of the intended marriage according to seniority in tail male with remainder to S. W. J. Trafford in fee simple. And it was thereby declared that C. E. J. Trafford and G. I. P. P. O'Shee should be the trustees thereof for the general purposes thereof and that J. Cator and D. G. L. Astley should be trustees thereof for the purposes of the Settled Land Acts, 1882 to 1890.

S. W. J. Trafford was now desirous of selling parts of the hereditaments settled by the will, and the questions had arisen whether he could sell the same freed from the annuities charged thereon by the will and whether to enable him to do so it was necessary to obtain an appointment of trustees for the purposes of the Settled Land Acts. He accordingly took out the present originating summons asking (1.) that it might be determined whether notwithstanding the execution of the disentailing deed

and settlement the applicant now had the powers of a tenant for life in possession under the will and codicil in respect of (a) such of the hereditaments by the will devised as were comprised in both the disentailing deed and the settlement, and (b) such of the hereditaments devised by the will as were comprised in the disentailing deed but not in the settlement, and (2.) that if necessary J. Cator and D. G. L. Astley or some fit and proper persons might be appointed trustees for the purposes of the Settled Land Acts, 1882 to 1890, of (a) the compound settlement consisting of the will and second codicil, disentailing deed, and settlement, and (b) the compound settlement consisting of the will and second codicil and disentailing deed.

The respondents to the summons were the trustees for the purposes of the Settled Land Acts, 1882 to 1890, both of the will and codicil and also of the settlement.

P. B. Lambert, for the summons. As regards the first question, if the fact of the applicant having once been tenant in tail in possession gave him an indestructible right to exercise the powers of a tenant for life, this right would have applied to both sets of the property. It is submitted that, the applicant having once had the powers of a tenant for life in respect of the settled land, those powers still continue notwithstanding the execution by him of the disentailing deed. By s. 58, sub-s. 1 (1), a tenant in tail

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(1) Settled Land Act, 1882, s. 50, sub-s. 1: "The powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exerciseable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement."

Sect. 58, sub-s. 1: "Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them

were a tenant for life as defined in this Act (namely):

"(i.) A tenant in tail . . ."

Sub-s. 2: "In every such case, the provisions of this Act referring to a tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land, shall extend to each of the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised."

Sub-s. 3: "In any such case any reference in this Act to death as regards a tenant for life shall, where necessary, be deemed to refer to the

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when in possession has the powers of a tenant for life. By s. 50, sub-s. 1, the powers of a tenant for life are not capable of assignment and remain exercisable by him after and notwithstanding any assignment of his estate or interest under the settlement. The disentailing deed in the present case was an assignment by the applicant of his estate or interest under the settlement, and he is not precluded by the execution of that deed from continuing to exercise the powers of a tenant for life.

[WARRINGTON J. referred to s. 15 of the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74).]

It is submitted that so long as the charge of the annuities created by the will is subsisting there is a subsisting settlement and that the applicant, even if he has disposed of his estate, can nevertheless continue to exercise the powers of a tenant for life: *In re Lord Wimborne and Browne's Contract*. (1)

[WARRINGTON J. referred to *In re Campbell*. (2)]

[*Attorney-General v. Owen* (3), *In re Gordon and Adams' Contract* (4), and *In re Mundy and Roper's Contract* (5) were also referred to.]

H. R. Darlington, for the respondents. The applicant by barring his estate tail and thereby becoming tenant in fee simple of the settled estate has ceased to have the powers of a tenant for life under s. 58 of the Act. The words "when the estate or interest . . . is in possession" in sub-s. 1 of that section show that the powers of a tenant for life can only be exercised while the estate of the tenant in tail is in possession. The applicant therefore ceased to have those powers when he ceased to be a tenant in tail. Sub-s. 2 coupled with s. 50 does not confer on the tenant for life the disability of never being able to get rid of those powers. A tenant for life cannot exercise his powers after his death. By sub-s. 3 of s. 58 reference to death as regards a tenant for life is to be deemed to refer to the determination by death or otherwise of the estate or interest of the

determination by death or otherwise of such estate or interest as last aforesaid."

(1) [1904] 1 Ch. 537.

(2) [1902] 1 K. B. 113.

(3) [1899] 2 Q. B. 253.

(4) [1914] 1 Ch. 110.

(5) [1899] 1 Ch. 275.

persons given the powers of a tenant for life by that section. After such determination therefore they cannot exercise such powers. The estate of a tenant in tail must for the purpose of this sub-section be considered to be determined when it is enlarged into a fee simple by a disentailing deed.

[WARRINGTON J. referred to *In re Mundy and Roper's Contract*. (1)]

What one has to find under s. 50 is an assignment by the tenant for life of his estate or interest under the settlement so as to bring it within that section. The Fines and Recoveries Act, 1833, enables a tenant in tail to obtain a certain result, namely, to dispose of his estate as a fee simple by the execution of a disentailing deed duly enrolled according to the Act. Such a deed is not an assignment of an estate or interest under a settlement within s. 50 of the Act of 1882.

[WARRINGTON J. The Fines and Recoveries Act, 1833, provides in effect that a tenant in tail is to be treated as a tenant in fee simple provided that he complies with the requirements of the Act as to enrolment.]

P. B. Lambert, in reply, referred to *In re Dunsany's Settlement*. (2)

WARRINGTON J. In this case the applicant is tenant in fee simple in possession of certain estates originally devised by the will of Edward William Trafford and he seeks to have it determined whether he now has the powers of a tenant for life in possession under that will in respect of them. He says that he once had the powers of a tenant for life and having once had those powers they continue notwithstanding that he has executed a disentailing deed and is now seised in fee simple, and the short question I have to decide is whether the applicant's contention is correct. [His Lordship stated the facts and continued:] The title of those estates at present is that, subject to the annuities still subsisting, the estates are limited to the applicant in fee. He desires to sell freed from the annuities created by the testator's will and can only do that if he can sell as a person

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(1) [1899] 1 Ch. 290.

(2) [1906] 1 Ch. 578.

WARRINGTON J. having the powers of a tenant for life, and for that reason he seeks to have it decided that he has those powers.

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While he was tenant in tail in possession he came within the provisions of s. 58, sub-s. 1, of the Settled Land Act, 1882. [His Lordship read the sub-section and also sub-s. 2 and continued:] Then comes sub-s. 3: "In any such case any reference in this Act to death as regards a tenant for life shall, where necessary, be deemed to refer to the determination by death or otherwise of such estate or interest as last aforesaid"—that is to say, taking the case of a tenant in tail, any reference in the Act with regard to the death of the tenant for life shall refer to the determination of an estate tail. Sub-s. 3 apparently means that the powers continue so long as the estate or interest continues and no longer. The estate or interest which under s. 58 gave to the applicant the powers of a tenant for life has now determined and his powers have ceased. But it is said that he once had those powers and that having had them they remain, and that he cannot by any means be divested of them so long as he lives. That depends on s. 50, sub-s. 1, which provides that "The powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exerciseable by the tenant for life"—that must be read as including the person who under s. 58 has the powers of a tenant for life—"after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement." The contention on behalf of the applicant is that the disentailing deed is an assignment of the estate or interest of the tenant in tail under the settlement, and consequently that the concluding words of sub-s. 1 of s. 50 apply and that the powers remain exerciseable notwithstanding the execution of the disentailing deed. Is the execution of a disentailing deed an assignment of the estate or interest of the tenant in tail under the settlement within the meaning of that sub-section? The answer to that is that you must look at the provisions of the Fines and Recoveries Act, 1833, to see what is the effect of such a deed. Sect. 15 of the Act, reading it shortly, provides that "After the 31st day of December, 1833, every actual tenant in tail,

whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons . . . whose estates are to take effect after the determination or in defeasance of any such estate tail . . .” That is the provision of the Act. It renders lands which previously could not have been effectually disposed of by the owner of the particular estate capable of effective disposition. For the purposes of effective disposition it turns the estate of the tenant in tail into an estate in fee simple provided only that the formalities required by the Act are observed and followed, namely, if the concurrence of any protector of the settlement is obtained and the assurance is enrolled as a disentailing assurance. What has the applicant done? He has done what the Act says he may do. He has disposed of the lands as if he were a tenant in fee simple and has thereby constituted himself a tenant in fee simple. Is that disentailing deed for the purposes of s. 50 an assignment of his estate or interest as tenant in tail under the settlement? It seems to me that it clearly is not. He has never disposed of his estate or interest at all. In my opinion the applicant, although he was once a tenant in tail, has ceased, by reason of the conveyance which he has executed, to be a tenant in tail and to have the powers of a tenant for life.

I must therefore answer the first question in the negative.

P. B. Lambert, for the applicant. The next question is whether there is a compound settlement constituted by the will and codicil, the disentailing deed, and the settlement. By s. 2, sub-s. 1, of the Act “settlement” is defined to consist of “any deed, will, agreement for a settlement, . . . or other instrument, or any number of instruments, . . . under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way

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of succession." (1) Under the will there are still subsisting annuities, and the limitations under it therefore still continue. Accordingly the will is one of the instruments under which persons take in succession. By virtue of the will and the settlement the lands stand limited to persons in succession. It is clear on the authorities that if there had been a term limited to secure the annuities, as in *In re Marquis of Ailesbury and Lord Iveagh* (2), or a trust to pay them, as in *In re Phillimore's Estate* (3), there would have been a compound settlement. But on principle it is submitted it makes no difference whether or not there is a term to secure or a trust to pay the annuities. It is the beneficial interest to which regard is to be had. If in the present case the annuities fell into arrear the annuitants could get a term under s. 44 of the Conveyancing Act, 1881, and be put into the same position as they would have been in if the annuities had originally been secured by a term. [He also referred to *In re Gordon and Adams' Contract*. (4)]

H. R. Darlington, for the respondents. The respondents desire to assist the applicant, but are bound on behalf of the persons whom they represent to state such objections as may be suggested. There are three points to be considered. First, it is submitted that within s. 2, sub-s. 1, of the Act of 1882 there is nothing left in the original will which shows a limitation or trust for persons in succession under instruments of which the will forms one. Secondly, the material time to be considered is the time when the compound settlement is alleged to take effect: Settled Land Act, 1882, s. 2, sub-s. 4. Thirdly, if the Court comes to the conclusion in this case that there is a compound settlement it will be going beyond the authorities.

(1) Settled Land Act, 1882, s. 2, sub-s. 1: "Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land,

or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires."

(2) [1893] 2 Ch. 345, 357.

(3) [1904] 2 Ch. 460.

(4) [1914] 1 Ch. 110.

There is a hiatus between the execution of the disentailing deed and the execution of the settlement. The case comes to this: Was there a settlement at the date of the execution of the settlement of 1914?

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Attorney-General v. Owen (1) is distinguishable. There the testatrix created a trust for the payment of the annuities in question, and the case therefore came within s. 2, sub-s. 1, of the Act.

[WARRINGTON J. referred to the definition of "settlement" in s. 22 of the Finance Act, 1894 (57 & 58 Vict. c. 30), and to *Attorney-General v. Coulson*. (2)]

In that case there was also a trust to pay the annuities in question.

In the class of cases like the *Ailesbury Case* (3) one finds a limitation by reason of the existence of the term. In *In re Phillimore's Estate* (4) there was a trust. The language of Stirling J. in the *Ailesbury Case* (5) shows that he considered that there might be a person entitled to apply to the Court under the Settled Estates Act, 1877, when the powers of the Settled Land Act were exhausted. There is here no trust for payment of the annuities, but merely a charge. The word "limited" in s. 2, sub-s. 1, of the Act must be read strictly as a word applicable to an estate and not to an equitable interest.

In re Gordon and Adams' Contract (6) is really a decision in the respondents' favour. There is nothing in the judgment in that case to show that a mere charge unsupported by a term would be within s. 2, sub-s. 1.

P. B. Lambert was not called upon to reply.

WARRINGTON J. The question which I have now to determine is whether there is a compound settlement affecting certain lands. I am asked to appoint trustees for the purposes of the Settled Land Acts of an alleged compound settlement consisting of a will and codicil, a disentailing deed, and a deed of resettlement. The only question is whether there is a compound

(1) [1899] 2 Q. B. 253.

(2) [1899] 2 Q. B. 253.

(3) [1893] 2 Ch. 345.

(4) [1904] 2 Ch. 460.

(5) [1893] 2 Ch. 355.

(6) [1914] 1 Ch. 110.

WARRINGTON J. settlement, or whether the only settlement now subsisting is that created by the resettlement. [His Lordship stated the facts and continued:]

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The question arises not with regard to that part of the estates settled by the original will which remains vested in Sigismund William Joseph Trafford in fee simple, but with regard to the part comprised in the settlement of April 17, 1914. The question is whether those estates stand limited to persons by way of succession under that deed only, or whether they stand so limited under and by virtue of the will and codicil, the disentailing deed, and the settlement together, and that question turns on whether within the meaning of the Act there are any subsisting limitations under the will. It is conceded that if the limitations under the will are completely exhausted and the applicant at the date of the settlement of April 17, 1914, was merely seised in fee simple there would be no question of any compound settlement. Sect. 2, sub-s. 1, of the Settled Land Act, 1882, is as follows: [His Lordship read the sub-section and continued:]

At the date when the resettlement was executed by S. W. J. Trafford, by the will of the original testator E. W. Trafford and the disentailing deed the estates stood limited to the applicant in fee simple, but there was contained in the will a charge of subsisting annuities on the estates. Did the estates at that moment stand limited to or in trust for any person by way of succession? The question fortunately is, I think, covered by authority. There is first the decision of Stirling J. in *In re Marquis of Ailesbury and Lord Iveagh*. (1) In that case by virtue of certain old settlements of 1796 and 1826 Maria, Marchioness of Ailesbury was entitled to two jointures, one of which at least was secured by a term. In other respects the limitations of those two settlements were exhausted. The estates had been resettled by subsequent deeds in 1863 and in 1885. The tenant for life under the second of those two settlements had contracted to sell the estates, and the question was raised whether he could sell them discharged from the jointures of Maria, Marchioness of Ailesbury. He

(1) [1893] 2 Ch. 345.

could do so if there was still subsisting a settlement of which he was tenant for life and which could be treated as that settlement under which the Marchioness was entitled to the jointures. Stirling J. decided that the tenant for life under the settlement of 1885 was in a position to sell discharged from the jointures: in other words, he determined that the settlement consisted not only of the deeds of 1863 and 1885, as to which there was no question, but also of the deeds of 1796 and 1826. The only interests subsisting under those two earlier deeds were the jointures of Maria, Marchioness of Ailesbury, and the decision comes to this, that it is sufficient to create a compound settlement that there should still be subsisting under an earlier instrument such an interest as a jointure rent-charge, at all events if the jointure is secured by a term. So far that case would not cover the present case because there is here no term to secure the annuities.

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A similar case came before Farwell J. in *In re Phillimore's Estate*. (1) In that case the instruments under which the estates were said to be limited or held in trust for certain persons by way of succession were two deeds of August 3, 1886, and August 4, 1886, and the will of one W. B. Phillimore, who died in 1887. By the deed of August 3, 1886, W. B. Phillimore assured the estates to trustees in trust for such persons as he should by deed appoint, and by the deed of August 4, 1886, in exercise of the power of appointment he appointed that the trustees should hold the estates in trust for himself for life and after his death should pay an annual sum to certain persons, and he also appointed annuities to some other persons, and subject thereto the estates were to be held in trust for himself absolutely. It is obvious therefore that so far as that deed was concerned, subject to the life interest of W. B. Phillimore himself the only trust which could be said to create interests in succession was the trust for the payment of the annuities. W. B. Phillimore died in 1887, and his life interest therefore came to an end, and on that event happening the only trusts subsisting were for the payment of the annuities. By his will he gave the estate to trustees upon trust for sale and created a

(1) [1904] 2 Ch. 460, 463, 464.

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succession. The question was raised whether the deed of August 3, 1886, the deed of August 4, 1886, and the will together constituted a compound settlement, or whether the only settlement was that created by the will. Farwell J. said: "In my opinion this case is governed by the *Ailesbury Case*.⁽¹⁾ That decision has been approved by the Court of Appeal ⁽²⁾, and I ought not to fritter away the broad principle laid down in that decision by drawing subtle distinctions and differences, especially as to do so would only shew that there is a blot in the Act of which advantage might be taken to defeat its object." That is, he came to the conclusion that the principles applied by Stirling J. in the *Ailesbury Case* (1) applied in the case where the only subsisting interest was an annuity charged upon the estate in the ordinary way. He then states the facts and goes on to say: "In the *Ailesbury Case* (1) Stirling J. held that the then tenant for life of the Ailesbury estate, whose title was derived under a resettlement of 1885, could dispose of the land freed from a jointure created under the powers of deeds of 1796 and 1826, which formed part of the series of resettlements, though there had been regular disentailing deeds and resettlements in 1863 and 1885. That case was approved by the Court of Appeal in a subsequent case notwithstanding the comments of some learned writers in the interval. And it seems to me that if the connection between the deeds was sufficient in that case, much more is the connection between the deeds in the present case sufficient." Then he reads the following passage from the judgment of Chitty L.J. in *In re Mundy and Roper's Contract* (3), referring to the judgment of Stirling J. in the *Ailesbury Case* (1); "He held that the Savernake estate stood limited to uses in favour of various persons by way of succession under or by virtue of the series of deeds, and that the Marchioness Maria was one of the persons taking under the series of deeds, although she did not take by way of succession to the vendor. This was a broad view of the Act; but I repeat that, in my opinion, it was the right view." Farwell J. then continues: "In my opinion the present case presents less difficulty than that case, and is

(1) [1893] 2 Ch. 345.

(2) [1899] 1 Ch. 275.

(3) [1899] 1 Ch. 295.

governed by the principle there laid down; and I am certainly not disposed to explain away that principle." In my opinion, subject to another point raised on the will which I will mention directly, that case governs the present case. It shows that the subsistence of an annuity to one for life under the earlier instruments is sufficient to support the claim that a compound settlement exists.

Then there is the further point which has been raised. It is said that in *In re Phillimore's Estate* (1) there was a trust to pay the annuities and that in the *Ailesbury Case* (2) there was a distinct legal limitation of a term to secure the jointure, and that in the present case there is neither a trust nor a limitation of a term to secure the annuities, and that the case does not therefore come within the words "stands for the time being limited to or in trust for any persons by way of succession" in s. 2, sub-s. 1, of the Act of 1882. That point depends entirely upon whether the Court ought to give to the words "stands for the time being limited to or in trust for" so strict an interpretation as to confine them to estates or interests limited by the instrument in question. I do not think it ought to give them such a strict interpretation. It seems to me that if you find that the land is enjoyed in succession it is immaterial whether the land is limited by way of a succession of estates or interests or whether you find a succession of interests in whatever form created. In my opinion there is here a succession of interests, namely, the annuities followed by the subsequent estates, and that being so, the case comes within the *Ailesbury Case* (2) and *In re Phillimore's Estate* (1), and therefore there is a compound settlement constituted by the will and codicil, the disentailing deed, and the resettlement so far as regards the estates comprised in that resettlement, and so far as they are concerned I ought therefore to appoint trustees of the compound settlement.

Solicitor for all parties: *H. Hope Shakespear*.

(1) [1904] 2 Ch. 460.

(2) [1893] 2 Ch. 345.

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1914

Oct. 30.

In re FARNOL EADES IRVINE & CO., LIMITED.

CARPENTER *v.* THE COMPANY.

[1914 F. 1128.]

Company—Debenture-holder's Action—Foreclosure—Appointment of Receiver and Manager—Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 78), s. 1, sub-s. 1 (b)—Courts (Emergency Powers) Rules, 1914, r. 4.

A debenture-holder can issue a writ of summons claiming the usual relief in a debenture-holder's action and move for the appointment of a receiver and manager without any application to the Court under the Courts (Emergency Powers) Act, 1914.

Observations on the word "foreclose" in s. 1, sub-s. 1 (b), of the Act.

MOTION.

This was a debenture-holder's action in which the plaintiff on behalf of herself and all other debenture-holders claimed (1.) a declaration of charge upon all the undertaking, assets, and effects of the company; (2.) all necessary and proper accounts and inquiries; (3.) payment of the amount secured; (4.) foreclosure or sale; and (5.) the appointment of a receiver and manager.

The writ was issued on October 2, 1914, and the plaintiff now moved for the appointment of a receiver and manager. The business consisted of a printing and other associated businesses.

The plaintiff had made no application to the Court under the Courts (Emergency Powers) Act, 1914 (1), for liberty to bring or

(1) Courts (Emergency Powers) Act, 1914, s. 1: "(1.) From and after the passing of this Act no person shall—(a) proceed to execution on, or otherwise to the enforcement of, any judgment or order of any court (whether entered or made before or after the passing of this Act) for the payment or recovery of a sum of money to which this sub-section applies, except after such application to such court and such notice as may be provided for by rules or directions under this Act; or (b) levy any

distress, take, resume, or enter into possession of any property, exercise any right of re-entry, foreclose, realise any security (except by way of sale by a mortgagee in possession), forfeit any deposit, or enforce the lapse of any policy of insurance to which this sub-section applies, for the purpose of enforcing the payment or recovery of any sum of money to which this sub-section applies, or, in default of the payment or recovery of any such sum of money, except after such application to such court

proceed with the action, and the defendants now took the objection that in the absence of such an application the motion could not be entertained.

H. S. Preston, for the motion.

W. Whately, for the defendants. The case is within the prohibition contained in s. 1, sub-s. 1 (*b*), of the Act both in respect of the writ of summons and in respect of the present motion. The writ expressly asks for foreclosure. As to the motion itself, the object of the Act would be defeated if a motion of this nature could be brought on in open Court without a previous application by the plaintiff under the Act. Rule 4 (1.), directing an application under the Act to be made in chambers, makes it plain that publicity affecting the credit of the defendants was meant to be avoided, and a motion of this kind is a remedy which ought not to be pursued without giving the defendants the opportunity of delay afforded by sub-s. 2 of s. 1 of the Act.

WARRINGTON J. This is an ordinary debenture-holder's action asking (1.) for a declaration that the plaintiff and all other holders of the mortgage debentures of the defendant company are entitled to a first charge upon all the undertaking, assets, and effects of the company; (2.) all necessary and proper accounts and inquiries; (3.) payment of the amount secured; (4.) foreclosure or sale; and (5.) the appointment of a receiver

and such notice as may be provided for by rules or directions under this Act. . . .

"(2.) If, on any such application, the court to which the application is made is of opinion that time should be given to the person liable to make the payment on the ground that he is unable immediately to make the payment by reason of circumstances attributable, directly or indirectly, to the present war, the court may, in its absolute discretion, after considering all the circumstances of the case and the position of all the parties, by order, stay execution or

defer the operation of any such remedies as aforesaid, for such time and subject to such conditions as the court thinks fit."

The Courts (Emergency Powers) Rules, 1914, r. 4: "(1.) Applications to the High Court under paragraph (*b*) shall be made by way of originating summons, and shall be dealt with in chambers in accordance with the practice of the Division of the High Court in which the application is made; but any such application may be adjourned into court at any stage of the proceedings or during the hearing."

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and manager. The writ was issued on October 2, 1914, and was issued without any previous application to the Court under the Courts (Emergency Powers) Act, 1914. The only defence raised to the application for the appointment of a receiver and manager is that no such previous application to the Court under the Act in question has been made. Whether that is a good objection or not turns upon the proper construction of s. 1 of the Courts (Emergency Powers) Act, 1914. Sub-s. 1 (a) is as follows: [His Lordship read it and continued:] It is important to observe that what that clause seeks to prevent is the doing of something by the person who has recovered judgment for the purpose of proceeding to execution or otherwise to its enforcement. But not only does the Act not restrain persons from commencing an action to recover a sum of money, but it actually contemplates that such an action may be brought by the use of the words "whether made before or after the passing of this Act." Then clause (b) provides that "no person shall levy any distress, take, resume, or enter into possession of any property, exercise any right of re-entry, foreclose." There again everything mentioned, except the word "foreclose" with which I will deal in a moment, obviously means something which can be done by a person independently or without any order of the Court. Clause (b) goes on, "realise any security (except by way of sale by a mortgagee in possession)," and so on, all things which a man can do without having recourse to the Court. Now I return to the word "foreclose." What does that mean? Foreclosure as a thing which can be done by a person has no meaning. Foreclosure is done by the order of the Court, not by any person. In the strict legal sense it is nothing more than the destruction of the equity of redemption which has previously existed. What then is meant in this clause by the prohibition against foreclosure? I am not prepared to say what it does mean, but I am prepared to say that in my opinion it does not mean to prevent a person from issuing a writ of summons for foreclosure. All that the Court does in such an action is to direct an account of what is due on the security and that if it is not paid within a certain time then that the equity of redemption shall be foreclosed. But even that is not foreclosure absolute, to obtain

which the mortgagee has to get a further order. Now looking at the general intention of the Act, what possible object can there be in preventing a man from taking the preliminary proceedings as the result of which he may obtain a judgment for foreclosure from the Court? I see none whatever. It seems to me that, whatever may be the meaning of the expression "foreclose" in this Act, it does not mean that a man may not put himself in a position to obtain an order of foreclosure from the Court. In my opinion, therefore, the Act does not prevent the issue of a writ or originating summons for foreclosure or the issue of a writ of summons in a debenture-holder's action for the realization of the security. As to the appointment of a receiver, if a receiver is appointed, possession is taken by the Court by means of its own officer. There is no entry into possession by any person by way of execution. The Court has power to refuse the appointment of a receiver or to give any special directions when and subject to what conditions the receiver shall take possession. The control is left entirely to the Court and there is nothing in the Act to prevent the Court from taking possession by the appointment of a receiver in a proper case. The Court knows if the appointment of a receiver is necessary in order to preserve the property and takes possession for the benefit of all parties. In my opinion, therefore, the objection taken by the defendants to the present motion fails, and I make the usual order for the appointment of a receiver and manager. (1)

Solicitors: *Windybank, Samuell & Lawrence; Charles R. Enever.*

(1) Note.—See *Behagg v. Palmer* [1914] W. N. 416.

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NEVILLE J.

1914

Nov. 3.

In re PETHICK, DIX & CO.
BURROWS *v.* THE COMPANY.

[No. 00320 of 1913.]

Employer and Workman—Employer insured—Liability of Insurance Company—Continued Liability of Employer—Both Employer and Insurance Company in Liquidation—Right of Proof for Compensation—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 5, sub-ss. 1, 2, 3, 5.

The effect of s. 5 of the Workmen's Compensation Act, 1906, is that where an employer has entered into a contract with any insurers in respect of any liability under the Act, in the event of the employer becoming bankrupt, or, being a company, having commenced to be wound up, the claim of a workman for compensation is against the insurers only. He has no right to prove in the bankruptcy or liquidation of the employer except in the case provided for by sub-s. 2, which applies only when the insurance does not cover the whole of the employer's liability.

RICHARD BURROWS, a workman in the employment of Pethick, Dix & Co., met with an accident on September 12, 1913, which it was admitted, entitled him to compensation under the Act. On October 31, 1913, an agreement was registered in the county court of Bradford by which the employers agreed to pay him 1*l.* a week according to the Act. The employers were insured against liability under the Act in the Northern Equitable Insurance Company. That company had made payments under the agreement. Pethick, Dix & Co. were ordered to be wound up compulsorily in November, 1913. Shortly afterwards the insurance company also went into liquidation.

It was stated that the insurance company could not pay any dividend.

The workman on January 5, 1914, put in a proof in the liquidation of the employers' company for 594*l.* alleged to be the capitalized value of the agreed compensation, and claimed preferential payment of 100*l.* part thereof.

The official receiver, who was the liquidator of the employers' company, rejected the proof on January 12, 1914, holding that the workman should have first proved in the insurance company's

liquidation and had not in any case a right to preferential payment. The order made declared that the applicant should be at liberty to prove for any balance which might remain after he had received a dividend from the insurance company. All questions of the amount for which he could prove were reserved.

The workman now moved to discharge the order made by the liquidator. The insurance company gave notice of a motion, by way of cross-appeal, to vary the order by declaring that the workman had no right to prove at all against the employers' company.

The case turned wholly upon the construction of s. 5, sub-ss. 1, 2, 3, and 5, of the Workmen's Compensation Act, 1906. (1)

(1) Sect. 5: "(1.) Where any employer has entered into a contract with any insurers in respect of any liability under this Act to any workman, then, in the event of the employer becoming bankrupt, or making a composition or arrangement with his creditors, or if the employer is a company in the event of the company having commenced to be wound up, the rights of the employer against the insurers as respects that liability shall, notwithstanding anything in the enactments relating to bankruptcy and the winding up of companies, be transferred to and vest in the workman, and upon any such transfer the insurers shall have the same rights and remedies and be subject to the same liabilities as if they were the employer, so however that the insurers shall not be under any greater liability to the workman than they would have been under to the employer.

"(2.) If the liability of the insurers to the workman is less than the liability of the employer to the workman, the workman may prove for the balance in the bankruptcy or liquidation.

"(3.) There shall be included among the debts which under section one of the Preferential Payments in Bankruptcy Act, 1888, and section four of the Preferential Payments in Bankruptcy (Ireland) Act, 1889, are in the distribution of the property of a bankrupt and in the distribution of the assets of a company being wound up to be paid in priority to all other debts, the amount, not exceeding in any individual case one hundred pounds, due in respect of any compensation the liability whereof accrued before the date of the receiving order or the date of the commencement of the winding up, and those Acts and the Preferential Payments in Bankruptcy Amendment Act, 1897, shall have effect accordingly. Where the compensation is a weekly payment, the amount due in respect thereof shall, for the purposes of this provision, be taken to be the amount of the lump sum for which the weekly payment could, if redeemable, be redeemed if the employer made an application for that purpose under the First Schedule to this Act. . . .

"(5.) The provisions of this section with respect to preferences and

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NEVILLE J. *Herbert J. Barclay (H. Fenton with him)*, for the appeal.

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Sub-ss. 1 and 2 of s. 5 give the workman a right against the insurers, but they do not take away the right to prove against the employer. If sub-s. 5 takes away preferential rights it does not take away the right to prove, and it is submitted that the words "as aforesaid" in that sub-section refer to the whole preceding part of the section, and that the Court must look at the whole section.

[NEVILLE J. Is there any statutory right to preference other than that given by sub-s. 3?]

Sect. 209 of the Companies (Consolidation) Act, 1908, gives the right, but it is expressed to be subject to s. 5 of the Workmen's Compensation Act, 1906.

If the insurer is insolvent there is no insurance.

Wilfrid M. Hunt, for the employers. There is no right at all in this case for the workman to prove against the employer under sub-ss. 1 and 2. The putting the workman in the place of the employer as against the insurer creates an inference that the employer is released, and sub-s. 2 by giving the right to prove against the employer in one case only makes that inference irresistible.

NEVILLE J. It appears to me that sub-s. 5 is fatal to any claim to priority of payment, because the only statutory provision which gives to the workman priority of payment in the case of a liquidation or bankruptcy of an employer is sub-s. 3 of s. 5 of the Workmen's Compensation Act, 1906, and sub-s. 5 says: "The provisions of this section with respect to preferences and priorities shall not apply where the bankrupt or the company being wound up has entered into such a contract with insurers as aforesaid." That, to my mind, clearly refers to the early part of the section, which says: "Where any employer has entered into a contract with any insurers in respect of any liability under this Act to any workman." I should have been glad to escape if I could from the conclusion that the result of the section is to

priorities shall not apply where the bankrupt or the company being wound up has entered into such a contract with insurers as aforesaid."

deprive the workman of his rights against the employer's estate, NEVILLE J. except under sub-s. 2 of s. 5, but it seems to me that were I to say that the liability of the employer remains because it is not expressly released under the section, the workman might proceed against the employer though by the transfer of the employer's rights against the insurance company to himself, he had deprived the employer of the benefit of the contract that he had entered into with the insurer. It seems to me it would be impossible in face of the strong words that are used to impute any such intention to the Legislature. The result is, therefore, that I think the operative part of the registrar's order is right, and there is no right of proof against the employer's estate.

I think, therefore, the appeal fails.

Solicitors: *J. Scott Duckers; Jaques & Co., for Watson, Son & Smith, Bradford.*

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In re MARYON-WILSON'S SETTLED ESTATES.

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[1914 M. 1118.]

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Settled Estate—Revenue—Increment Value Duty—Reversion Duty—Payable out of Capital Moneys—Charge—Expenditure “reasonably incurred”—Accounts—Returns—Valuations—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21, sub-s. (x).—Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 11—Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), ss. 1, 2, 4, 13; s. 15, sub-s. 2; s. 25; s. 26, sub-ss. 1, 2; s. 39, sub-ss. 1, 4.

Where a tenant for life of settled estates has made various sales and granted leases of parts of the settled estate, and incurred expenditure in the preparation of accounts, returns, and valuations necessary to enable the Commissioners to assess the increment value duty payable on sales and the reversion duty payable on the determination of leases:—

Held, (1.) that increment value duty and reversion duty were properly payable out of capital moneys as between tenant for life and remainderman.

In re Smith-Bosanquet's Settled Estates (1912) 107 L. T. 191 followed.

Where no sufficient capital moneys were available for such payment the tenant for life, by the joint operation of s. 39 of the Finance (1909-10) Act, 1910, and s. 11 of the Settled Land Act, 1890, could

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charge the whole of the settled land with the increment value duty or the reversion duty payable in respect of any part of the settled land.

(2.) That the expenses incurred in the ascertaining and payment of duties, so far as these expenses arose in respect of a transaction involving the exercise of any of the statutory powers conferred upon the limited owner, were expenses incidental to the exercise of these powers within sub-s. (x.) of s. 21 of the Settled Land Act, 1882, and payable out of capital. Included in such cases would be the expenses incurred in respect of increment value duty, and of the reversion duty payable on the acceptance of a surrender of a lease; but in cases where reversion duty became payable on the determination of a lease by effluxion of time the expenses would not come within sub-s. (x.), and if the tenant for life desired to throw them upon the settled land he must exercise his statutory power of charging for that purpose.

Held, further, that s. 39 of the Finance (1909-10) Act, 1910, coupled with s. 11 of the Settled Land Act, 1890, enabled the limited owner to charge the settled estates with any expenditure reasonably incurred in connection with the original site valuation necessitated by the Finance (1909-10) Act, 1910, and also with the valuation under s. 15 of the Act necessary for ascertaining reversion duty.

UNDER the will of his father, dated August 1, 1896, certain estates in Middlesex and a small portion in Kent stood limited to the use of the applicant, Sir Spencer Pocklington Maryon Maryon-Wilson, for life, without impeachment of waste, with remainder to his son, the defendant Thomas Spencer Maryon-Wilson, for his life, with remainder to his first and other sons successively in tail male, with divers remainders over. The defendants Arthur George Du Cane and George Alexander Scott were the present trustees of the settlement made by this will, for the purposes of the Settled Land Acts. The estates in Middlesex consisted in part of house property at Hampstead let on long leases at ground rents, and in part of land ripe for development as building land. The hereditaments in Kent consisted of certain pieces of land near Woolwich. Various leases and sales of parts of the Middlesex estates had been granted and made by the tenant for life after the passing of the Finance (1909-10) Act, 1910, and the tenant for life was liable under the Act for increment value duty (if any) which might thereafter be assessed as payable in respect of such leases and sales, but such duty had in no case been yet assessed. In the course of the years 1910 and 1911 some forty notices had been served upon the tenant for life or

his agent requiring particulars with reference to 900 several properties comprised in the Middlesex estates, and these particulars had been furnished.

Under a second settlement dated April 16, 1910, certain hereditaments in the county of Kent, consisting of the family residence, Charlton House, and the park and lands near Woolwich, and other lands, some let on long leases and some ripe for building purposes, were settled upon the same trusts as the Middlesex property, and the trustees of this settlement for the purposes of the Settled Land Acts were also parties to the action. In respect of the lands comprised in this second settlement divers leases and sales had also been granted and made by the tenant for life, and particulars delivered and expenses incurred, as in the case of the Middlesex estates. In some cases, since April 30, 1909, leases had determined either by effluxion of time or by acceptance of surrenders of parts of the Kent estates. There was a considerable sum of capital money in the hands of the trustees of the will and of the second settlement out of which the increment value duty and reversion duty might be paid. The agent to the estate had been paid an extra remuneration of 153*l.* in addition to his yearly salary, on account of the additional work required in filling up forms required by the Commissioners. In thirteen cases provisional valuations had been received from the Commissioners, and in respect of these solicitors and estate agents had to be consulted and expense incurred in ascertaining whether appeals should be made from the valuations.

An originating summons dated May 15, 1914, was taken out on behalf of Sir Spencer Pocklington Maryon Maryon-Wilson, as the tenant for life in possession of the hereditaments comprised in the two settlements, for the determination, inter alia, of the questions—(1.) whether the applicant was entitled (apart from the provisions of the Finance (1909-10) Act, 1910) to a charge or lien upon all, or any, and what part of the hereditaments comprised in the two settlements for any sum of money (*a*) which he might from time to time have paid, or (*b*) which he might have become liable to pay when the following duties had been assessed under the Finance (1909-10) Act, 1910, in respect of (i.) increment value duty, which might be charged upon the

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sale by him as tenant for life of any land comprised in the said settlements respectively, or of any interest in any such land, or upon the grant by him of any lease, and (ii.) reversion duty which might be charged upon the determination of any lease of land comprised in the said settlements respectively.

(2.) Whether the applicant was entitled (apart from the provisions of the said Act) to a charge or lien upon all or what part of the hereditaments comprised in the said settlements respectively for the costs and expenses incurred by him in respect of his obligation under the said Act, and, in particular, (a) the preparation and making out of the returns by s. 26 of the said Act required to be made by him as such tenant for life, including the fees of his surveyor; (b) the checking and revision of the provisional valuations of the Commissioners of Inland Revenue (including surveyor's fees); and (c) the preparation and making out of the account by s. 15 of the said Act required to be delivered by him.

(5.) Whether, upon the true construction of the said Act, the applicant was entitled to raise, by mortgage or charge of all or any parts of the land comprised in either of the said settlements, the whole or any part of the expenses incurred by him in connection with the original or any other valuation made under the said Act of the land comprised in such settlements respectively, and, in particular, the expenses incurred in making up the returns under s. 26 of the Act, the account required by s. 15 of the Act, and the checking and revision of the provisional valuations of the Commissioners of Inland Revenue mentioned in s. 27.

The first person entitled under the limitations of the will to an estate tail in remainder in the Middlesex estates was also made a defendant to the action.

W. R. Sheldon, for the tenant for life of the settled estates. The questions asked by the summons turn chiefly upon the construction of s. 39 of the Finance (1909-10) Act, 1910(1), in conjunction with certain other provisions of the Act.

In regard to the first question asked by the summons it is

(1) See note on p. 38, post.

submitted that these duties, for which the tenant for life of a settled estate is liable under the Act, can properly be paid out of capital moneys: *In re Smith-Bosanquet's Settled Estates*. (1) If there are no capital moneys available for the purpose, the limited owner can charge the whole of the settled estate under s. 39 of the Finance (1909-10) Act, 1910, for the purpose of satisfying these duties. There is nothing in the section to limit the charge to the specific land dealt with by sale or lease. This charge will create an incumbrance under the Settled Land Act, 1890. The tenant for life is also entitled to the costs, charges, and expenses incidental to ascertaining and paying the increment value duty and reversion duty, which are costs incidental to the exercise of the powers of the Settled Land Act, 1882, and are properly payable out of capital moneys.

S. Leeke, for the trustees of the settlement, pointed out that even if the power under s. 39 only extended to the making of a limited charge upon the specific land dealt with, the tenant for life could, under s. 11 of the Settled Land Act, 1890, execute a mortgage upon the whole of the settled land to discharge it.

Wilfrid A. Greene, for the remainderman. It would be going beyond what was decided in *In re Smith-Bosanquet's Settled Estates* (1) to say that capital moneys generally might be applied in payment of these duties. The charge referred to in s. 39 of the Finance (1909-10) Act, 1910, is only upon the particular land in respect of which the duty is payable. There is no general charge upon the whole of the settled land, apart from the statute. The statute affords the machinery for obtaining a charge. If the tenant for life does not go through the formality of making the charge, he does not get it, and there is no incumbrance coming within s. 11 of the Settled Land Act, 1890. On the further point, the costs and expenses in connection with the payment of these duties are not incidental to the exercise of the statutory powers, and are not payable out of capital moneys under s. 21, sub-s. (x.), of the Settled Land Act, 1882. The costs, charges, and expenses there referred to are those incidental to a lease or sale in the ordinary meaning of the words. In the case of reversion duty, where the lease falls in by effluxion of time,

(1) 107 L. T. 191.

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the duty does not become payable by any exercise by the tenant for life of powers under the Settled Land Acts; it happens automatically. These costs cannot therefore be paid out of capital.

EVE J. I feel myself bound by the decision in *In re Smith-Bosanquet's Settled Estates* (1), where Parker J. held that increment value duty and reversion duty were both properly payable out of capital moneys. The question as to the incidence of these duties as between tenant for life and remainderman was raised by the summons in that case and argued, and I must follow the learned judge and adopt his opinion. Having arrived at that conclusion, the question then arises how far the tenant for life can charge the settled estate to recoup or indemnify himself against any duty he may have paid, or be about to pay, on occasions where there are no sufficient capital moneys immediately available for making the payment.

By s. 39 of the Finance (1909-10) Act, 1910, it is obvious that he is empowered to create a charge upon some part of the settled estate. Whether that power is limited to the land the subject-matter of the transaction in respect of which increment value duty or reversion duty is payable, or whether it extends to the whole settled estate, is not of much practical importance because, as Mr. Leeke has pointed out, even if the power under s. 39 is restricted to the particular land, the tenant for life can immediately afterwards charge the rest of the settled land with the incumbrance, under s. 11 of the Settled Land Act, 1890. In these circumstances the true construction of s. 39 is a question of academic rather than practical interest, and I think all I need do is to say that by the joint operation of that section and s. 11 of the Act of 1890 the tenant for life can, in my opinion, charge the whole of the settled land with the increment value duty or the reversion duty payable in respect of any part of the settled land.

As to the question whether the expenses incurred in and about the ascertaining and payment of the duties are payable by the tenant for life or out of capital, I think so far as these expenses

arise in respect of a transaction involving the exercise of any of the statutory powers conferred upon the limited owner they are expenses incidental to the exercise of these powers within sub-s. (x.) of s. 21 of the Settled Land Act, 1882, and payable out of capital. Included in such cases would be the expenses incurred in respect of increment value duty payable on a sale, and of reversion duty payable on the acceptance by the limited owner of a surrender of a lease. But in cases where the reversion duty becomes payable on the determination of a lease by effluxion of time the expenses do not, I think, come within sub-s. (x.), and if the tenant for life wishes to throw these upon the settled land he must, I think, do so by exercising his statutory power to charge under s. 39 of the Act of 1910 and s. 11 of the Act of 1890.

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The further points raised by questions 2 and 5 of the summons were then argued.

W. R. Sheldon, for the tenant for life. The tenant for life is entitled to be recouped out of the estate in respect of the accounts required under s. 15, sub-s. 2, and s. 26, sub-s. 2, of the Act, and also for checking the provisional and other valuations. The Act cast a heavy burden upon him to furnish these accounts and to test the accuracy of the original site valuation. This is of the utmost importance to the estate, and actuaries and surveyors have to be employed, and the agent of the estate remunerated for the extra labour cast upon him. A large number of returns have been made in the present case, and it is submitted that these expenses are all "reasonably incurred" within the meaning of s. 39 of the Act.

Wilfrid A. Greene, for the remainderman. The "valuation" in s. 39 means the valuation necessary on the particular occasion when the duty is payable. The power to charge does not arise until some duty becomes payable, and it only becomes payable when there is a sale or a lease. The phrases used in sub-s. 1 and sub-s. 4 of s. 39 really mean the same thing as to the costs and expenses incurred. The valuation means the particular valuation in a particular case; and no doubt it is open to the trustees to revise the valuations.

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EVE J. The Act of 1910 contemplates, among other things, the contribution by landowners to the Exchequer of a percentage of the amount by which the site value of the land transferred exceeds, at the date of the transfer, its original site value, and in order to arrive at the amount of this contribution it was in the first place obviously essential to ascertain the original site value of the land. The Act accordingly provides elaborate machinery for ascertaining the original site value, and thereby imposes upon landowners obligations which not infrequently involve much expenditure of time and money. It was no doubt foreseen that in many cases the individuals called upon to discharge these obligations would not be absolute owners of the land, and that in these cases it would be advisable, if possible, to adjust the burden so as to distribute it fairly between all the persons interested in the fee. An attempt to bring about such adjustment is made by s. 39 of the Act, which does, in my opinion, operate to give the limited owner relief against the expenditure incurred by him in connection with the original valuation, constituting the basis upon which the whole of this particular legislation was founded. It does not purport to remunerate him for his expenditure of time and trouble, but only enables him to charge the capital with any reasonable expenditure he may have incurred in connection with the original site valuation. The qualification introduced by the word "reasonably" imposes upon the trustees of the settled estate the duty of satisfying themselves that the expenditure incurred by the limited owner in connection with the valuation has been reasonable, and if there be cases in which the trustees have a doubt as to whether or not particular expenditure has been reasonably incurred, it will be their duty to take the direction of the Court thereon. If I were to adopt the view contended for on behalf of the remainderman that the expenditure referred to in the concluding words of sub-s. 1 of s. 39 is expenditure in connection with the valuation necessary for the transaction dealt with in the earlier part of the sub-section, I should not only be ignoring the fact that this expenditure is, as I have decided, already provided for in all cases where the tenant for life is exercising his statutory powers under the

Settled Land Acts by sub-s. (x.) of s. 21 of the Act of 1882, but I should also, I think, be failing to give due weight to the different language employed in sub-ss. 1 and 4 of s. 39 itself. Where, as in the latter of these sub-sections, the expenditure is restricted to costs or expenses incurred in respect of the payment of the duty, the Act says so in plain and unmistakable terms, and I think if the expenditure referred to in sub-s. 1 had in like manner been intended to be restricted to costs and expenses incurred in respect of the payment of the duty the same language would have been used in that sub-section as is used in sub-s. 4. I think, therefore, that the tenant for life is entitled by virtue of this section, coupled with s. 11 of the Settled Land Act, 1890, to charge the settled estates with any expenditure reasonably incurred by him in connection with the original site valuation, and, by parity of reasoning, in connection with the valuation under s. 15 of the Act necessary for ascertaining reversion duty. I propose to limit the order to a declaration to this effect, and to leave open the question whether any particular expenditure has or has not been reasonably incurred in the present case.

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Solicitors for all parties : *May, How & Chilver.*

NOTE.—The provisions of the Act bearing upon the various points discussed were as follows :

Sect. 1. "Subject to the provisions of this part of this Act, there shall be charged, levied, and paid on the increment value of any land a duty, called increment value duty, at the rate of one pound for every complete five pounds of that value accruing after the thirtieth day of April nineteen hundred and nine . . ."

Sect. 2, sub-s. 1. "For the purposes of this part of this Act the increment value of any land shall be deemed to be the amount (if any) by which the site value of the land, on the occasion on which increment value duty is to be collected as ascertained in accordance with this section, exceeds the original site value of the land as ascertained in accordance with the general provisions of this part of this Act as to valuation . . ."

Sect. 4, sub-s. 1. "On any transfer on sale of the fee simple of any land, or of any interest in land, or on the grant of any lease of any land for a term exceeding fourteen years, increment value duty shall be assessed by the Commissioners, and paid by the transferor or lessor, as the case may be."

Sub-s. 4. "Any duty assessed by the Commissioners under this section

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shall be a debt due to the Crown from the transferor or lessor, as the case may be, and for the purpose of calculating the amount of increment value duty to be collected on any subsequent occasion shall be deemed to have been paid."

Sect. 13. "On the determination of any lease of land there shall be charged, levied, and paid, subject to the provisions of this part of this Act, on the value of the benefit accruing to the lessor by reason of the determination of the lease a duty, called reversion duty, at the rate of one pound for every complete ten pounds of that value."

Sect. 15, sub-s. 1. "Reversion duty shall be recoverable from any lessor to whom any benefit accrues from the determination of a lease as a debt due to His Majesty, but shall rank *pari passu* with all other debts due from such lessor."

Sub-s. 2. "Every lessor shall, on the determination of a lease on the determination of which reversion duty is payable under this section, deliver an account to the Commissioners setting forth the particulars of the land and the estimated value of the benefit accruing to the lessor by the determination of the lease."

Sect. 25 defined the various values of land, namely, "gross value," "full site value," "total value," "assessable site value," and "site value."

Sect. 26, sub-s. 1. "The Commissioners shall, as soon as may be after the passing of this Act, cause a valuation to be made of all land in the United Kingdom, showing separately the total value and the site value respectively of the land, and in the case of agricultural land the value of the land for agricultural purposes where that value is different from the site value. Each piece of land which is under separate occupation, and, if the owner so requires, any part of any land which is under separate occupation, shall be separately valued, and the value shall be estimated as on the thirtieth day of April nineteen hundred and nine."

Sub-s. 2. "Any owner of land and any person receiving rent in respect of any land, shall, on being required by notice from the Commissioners, furnish to the Commissioners a return containing such particulars as the Commissioners may require as to the rent received by him, and as to the ownership, tenure, area, character and use of the land, and the consideration given on any previous sale or lease of the land, and any other matters which may properly be required for the purpose of the valuation of the land, and which it is in his power to give, and, if any owner of land or person receiving any rent in respect of the land is required by the Commissioners to make a return under this section, and fails to make such a return within the time, being not less than thirty days, specified in the notice requiring a return, he shall be liable to a penalty not exceeding fifty pounds to be recoverable in the High Court."

Sect. 39, sub-s. 1. "Where the fee simple of any land, or any interest in land, in respect of which increment value duty, or reversion duty is charged, is settled land within the meaning of the Settled Land Act, 1882, or is vested in a trustee, and the tenant for life, or persons having the powers of a tenant for life, or the trustee, is the person who is liable to pay any sums on account of either of these duties, he shall be entitled to charge by deed

upon the land or interest in land any amount paid by him, or which he may then be or may thereafter become liable to pay, in respect of either of these duties, and the amount of any expenditure which he may have reasonably incurred in connection with the valuation, and the benefit of any such charge may be transferred in like manner as a mortgage."

Sub-s. 4. "Where the fee simple of any land, or any interest in land in respect of which increment value duty or reversion duty is charged, is vested in a mortgagee who is liable to pay any sum on account of either of those duties, he shall be entitled to add to his security the sum for which he is so liable, including any costs or expenses properly incurred by him in respect of the payment of the duty."

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In re O'GRADY'S SETTLEMENT.

O'GRADY *v.* WILMOT.

[1914 O. 687.]

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Oct. 28, 29.

Settlement—Real Estate—Trust for Sale—Conversion—Power to appoint Proceeds—Exercise of Power by Will—Will—Construction—Reconversion—Determination of Trust for Sale—Estate Duty—Incidence—"Property which does not pass to the executor as such"—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9, sub-s. 1.

Testatrix, in exercise of an absolute power to appoint proceeds of sale of real estate which was settled upon trust for sale, by will appointed that the trustees of the settlement should stand possessed of the "hereditaments property money stocks funds and securities" which should be subject to the trusts of the settlement upon trust to "convey assign transfer and pay" the same to the trustees of the will, upon trust for conversion with power to postpone conversion. The trust for sale under the settlement had not been exercised at her death as to the bulk of the property:—

Held, (without deciding whether or not the will effected a reconversion into realty of the property which by virtue of the trust for sale had been notionally converted into personalty,) that the testatrix intended the property to be assured to the appointees in the form in which it de facto was at her death, namely, as land; that she intended to put an end to the trust for sale; and that the estate duty payable in respect of the appointed property was not payable out of the residuary estate, but was charged on the land the subject of the appointment as "property which does not pass to the executor as such" within s. 9, sub-s. 1, of the Finance Act, 1894.

In re Lord Grimthorpe [1908] 2 Ch. 675 applied.

ADJOURNED SUMMONS.

The facts were stated by Eve J. as follows:—

"By the first of two indentures, both dated November 28,

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1881, certain freehold hereditaments in Northumberland were conveyed to trustees upon trust after the marriage of the settlor at her request in writing during her life and after her death at their discretion to sell the same and to stand possessed of the net proceeds upon the trusts of the second indenture, whereby it was declared that they should invest the said net proceeds and stand possessed thereof and of the stocks, funds, shares, or securities for the time being representing the same and of the income thereof respectively 'upon trust for such person or persons and for such purposes and in such manner' as the settlor should by deed or will appoint, and in default of or subject to any such appointment upon trust to pay the income of the trust premises to the settlor for life and after her death to her husband for life, with remainder as to corpus and income to the issue of the marriage.

"The settlor died in 1910, having made her will in the previous October.

"Between the date of the settlement and her death certain small portions of the settled property had been sold, and on each occasion, the settlor having appointed the proceeds of the sale to herself, the purchase-money was paid to her.

"At her death the bulk of the property remained unsold and she was and had been continuously from the date of the settlement in receipt of the rents and profits.

"By her will she recites adequately the indentures of 1881 and proceeds: 'Now by virtue and in pursuance and in exercise of the said recited power of appointment reserved to me by the said indentures of settlement of the 28th day of November 1881 and of all other powers me hereunto enabling I hereby appoint that the trustees for the time being of the said settlements shall from and after my decease stand possessed of all the hereditaments property money stocks funds and securities of whatsoever nature which at the time of my decease shall be subject in any way to the trusts of the said indentures of settlement upon trust to convey assign transfer and pay the same to' two persons, her husband being one and a Mr. Arthur George Ridout the other, 'whom I hereby appoint my trustees.' She then declares the trusts of the appointed property, being, shortly, trusts for sale and conversion with a power to postpone and a

superadded direction not to sell any of the property during the life of the husband without his consent. Subject to an annuity to her brother the income of the appointed property is given to her husband for life and he is the residuary legatee.

“The testatrix died on January 12, 1910.

“The estates the subject of the appointment are of considerable value, and the question has arisen whether the duty payable on the death of the testatrix is chargeable on the appointed realty, or ought to be paid out of the residuary estate.”

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Maugham, K.C., and *A. J. Spencer (F. H. L. Errington with them)*, for the residuary legatee and tenant for life of the appointed property. The question arises under s. 9, sub-s. 1, of the Finance Act, 1894. In the case of personal estate appointed by will under a general power of appointment the estate duty has been held not to be a charge upon the property appointed, and is payable out of the personal estate: *In re Hadley*. (1) The appointed fund was legal assets there. But that decision has no reference to real estate, which, as was pointed out by the Master of the Rolls at p. 32, vests in the executor by virtue of the Land Transfer Act.

In the present case there is a direction in the will for the trustees of the settlement to convey the real property to two named persons who receive it as devisees in trust; and the real estate thus appointed does not pass to the “executor as such.” If it is said that there was a conversion of the real estate into personal estate by the trust for sale in the settlement, then it is answered that there was a reconversion into land under the terms of the will. The executor has not to assent to the gift. The present case is a stronger one, on the words of the will, than *In re Lord Grimthorpe*. (2) The estate duty therefore must be borne by the appointed real estate alone.

Clayton, K.C., and *Andrewes-Uthwatt*, for persons interested in remainder in the appointed property. If the property has been reconverted to realty, the corpus of the duty falls to be paid out of it, and the residuary legatee as being also tenant for life will only have to bear so much loss of interest. Under

(1) [1909] 1 Ch. 20.

(2) [1908] 1 Ch. 666; [1908] 2 Ch. 675.

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the settlement, the property became by virtue of the trust for sale converted and was at the testatrix's death notionally personalty, and passed by the exercise of the power of appointment to the executor as such. At the moment of the death it was personal property, and under the doctrine of conversion was so for fiscal purposes; *Attorney-General v. Dodd* (1); *Attorney-General v. Johnson*. (2)

The property having been converted to personalty by the settlement, the effect of the exercise of the power of appointment is to vest it, not in the trustees of the will, the appointees, but in the executor as such; it cannot go to the trustees till the executor assents; the executor is the only person who can give a receipt for it: *In re Hadley*. (3) Reconversion, if there were any, would only affect the property when it got into the hands of the appointees and would not affect it in the hands of the executor. But here there was no reconversion. A trust for sale with a power to postpone does not prevent notional conversion. The overriding power to postpone sale which the testatrix gives to the trustees of her will shows that she intended to be dealing with property she had made her own.

The will, exercising the power, even if it affected to change the property to land, inasmuch as it could not operate till the death, would still leave the property to pass as personalty. But, so far from purporting to convert it back into land, it deals with it as money. What the will does is, if there was any land, to convert it into money. Assuming the testatrix wished by her will to reconvert personalty to land, she could not, by the exercise of the power of appointment which would not take effect till the expiration of a period of time after her death,—an interval in which there may be what Cozens-Hardy M.R. in *In re Hadley* (4), citing Lord Hardwicke, refers to as a stoppage in transitu—prevent the property passing to the executor as such.

[EVE J. Then *In re Lord Grimthorpe* (5) is wrong?]

No, because there the testator was absolute owner of the property, whereas here the testatrix had only an absolute power to

(1) [1894] 2 Q. B. 150.

(3) [1909] 1 Ch. 20, 29.

(2) [1907] 2 K. B. 885, 893.

(4) [1909] 1 Ch. 30.

(5) [1908] 1 Ch. 666; [1908] 2 Ch. 675.

appoint. But all argument on this head is academic because no intention to reconvert is shown in the will. To be effective such an intention must be unequivocal. If it is merely equivocal and may mean either conversion or no conversion, there can be no intention. Any intention to convert only takes effect subject to the right of the executor to take as such. But here there is no intention, because the testatrix has used words which are as applicable to personalty as to realty.

The property being, therefore, personalty at the death, the estate duty is payable out of residue. [They also referred to s. 5 of the Land Transfer Act, 1897. (1)]

Maugham, K.C., in reply. There is no effective trust for sale, but an absolute prohibition of sale, during the life of the husband. The property was de facto land, and was, by the will, to be handed over to the trustees in the condition in which it de facto was. The executor would have no right to require the trustees of the settlement to exercise the trust for sale and to hand over to him the proceeds. If so, nothing passed to the executor "as such." *In re Lord Grimthorpe* (2) is very near to the present case, the only difference being that this is a case of a power, while that was a case of property. But that difference is immaterial. The test is, as Cozens-Hardy M.R. puts it in that case, whether the executor could compel the trustees of the settlement to sell, and the answer is he could not. The will effected a reconversion from personalty to realty. But it is immaterial whether it did so or not, because the property would not in any case pass to the executor as such. The testatrix made the property her own, and directed her trustees to sell it; but that does not divert the incidence of the duty. She dealt with it as real estate, not money. She put an end to the trust for sale under the settlement.

The argument that there is a moment of time after the testatrix's death before her appointment can take effect has nothing in it. It is purely metaphysical and has never been

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(1) Sect. 5: "Nothing in this part of this Act shall affect any duty payable in respect of real estate or impose on real estate any other duty than is now payable in respect thereof." (2) [1908] 1 Ch. 666; [1908] 2 Ch. 675.

EVE J. heard of before. It would equally have applied in *In re*
1914 *Lord Grimthorpe*. (1)

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Before the Land Transfer Act, 1875, an executor never became
entitled to land by virtue of his office. Land appointed by will
under a general power is liable, as well as a testator's own land,
for payment of debts: *Fleming v. Buchanan*. (2) But the Land
Transfer Act does not really affect the present question.

EVE J. The facts of this case, which is one of some difficulty,
can be simply stated. [His Lordship stated them, and the
question for decision, as above, and continued:] The answer
involves the determination of the question whether the pro-
perty did or did not pass to the executor of the testatrix as
such within the meaning of sub-s. 1 of s. 9 of the Finance Act,
1894, a sub-section which has been considered by many judges
of first instance and construed by the Court of Appeal in *In re*
Hadley. (3)

It is argued on behalf of those entitled in remainder that the
appointed property—which was admittedly converted into per-
sonal estate on the execution of the settlement of 1881—retained
that character at the date of the testatrix's death and on the
happening of that event passed to the executor "as such," and
it is not disputed by the residuary legatee that if the property
was in fact personalty at the date of her death this conclusion is
inevitable. But his case is put in the alternative—although at
the same time it is conceded that each alternative may to some
extent overlap the other—either the will operates to effect a
reconversion of the property, or it demonstrates that the testatrix,
having what was in fact complete dominion over the property,
clearly intended, and has clearly expressed that intention, that
the property should not pass as personal estate, but should be
dealt with as realty.

In my opinion, if this will according to its true construction
establishes an intention on the part of the testatrix to bring
about a reconversion, the case falls within the decision of *In re*
Lord Grimthorpe. (1) It has been sought to distinguish that case

(1) [1908] 1 Ch. 666; [1908] 2 Ch. 675. (2) (1853) 3 D. M. & G. 976.
(3) [1909] 1 Ch. 20.

from the present on the ground that there the testator was in the events which had happened the absolute owner of the property, whereas here the testatrix only had a general power of appointment, but I do not see upon what principle any such distinction can be supported, and, in a case where the intention to reconvert was clear, I do not think a testator with an absolute power of appointment ought to be in any different position from one who is the absolute owner. Nor can I give effect to the argument founded on the suggestion that, even in cases where the intention to reconvert is clear, there is, if the reconversion is brought about by the exercise of a power of appointment, an interval of time between the death and the operation of the power of appointment during which the appointed property is vested in the executor in its converted condition.

I do not, however, propose to determine this matter upon the point whether or not there is reconversion brought about by the will. I think, whatever be the right conclusion on that point, this much at least is clear—that the testatrix contemplated and intended, in the circumstances in which she exercised this power, that the unsold land should be assured to the appointees in its then condition and as land. It is true that she has used a form of expression in which are to be found words applicable to every class of property, and some of them undoubtedly indicate a state of things such as would be brought about by conversion and investment of proceeds; but I think any apparent difficulty arising on this is met by the explanation suggested by Mr. Maugham, that the appointor was thereby only emphasizing her intention that the appointment should extend to every item and every class of property subject to the trusts of the settlement at the time of the appointment taking effect. The words “hereditaments, property” appropriately describe so much of the settled estate as had not been realized, “money” would include uninvested proceeds of any sale and undistributed rents, “stocks funds and securities” invested proceeds of sale. Then the trust is to “convey assign transfer and pay,” that is, to vest each category of property in the appointees by the appropriate assurance.

The conclusion I come to is that the appointor contemplated

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and intended putting an end to the trust for sale under the settlement, and that she has so done. It is quite immaterial that the will creates a new trust for sale; the point is that the executor cannot require the trust for sale created by the settlement to be executed, and in that condition of matters I do not see how I can hold that the appointed property has passed to the executor as such. It is common ground that the question is not affected by the Land Transfer Act, 1897, and the result is that in my opinion the estate duty is charged on the land the subject of the appointment, and is not payable out of the residuary estate, and I so declare.

Solicitors: *Darley, Cumberland & Co.; Gibson & Weldon, for F. W. Romney & Co., Malvern.*

A. L.

SARGANT J.

1914
 July 7.

In re JENKINS.

WILLIAMS v. JENKINS.

[1914 J. 801.]

Will—Trust—Life Interest—Provision against Alienation—Income accruing but not received by Trustees at Date of Alienation—Apportionment Act, 1870 (33 & 34 Vict. c. 35), s. 2.

A testator gave a share in his estate to trustees upon trust to pay the income thereof to his son for life, but directed that any income for the time being payable to him "shall only be paid to him so long as he shall not attempt to assign or charge the same." The son by deed purported to assign his life interest by way of mortgage to secure money lent. At the date of the mortgage the trustees had in their hands a sum of 356*l.* representing income of the son's share received by them before that date, and they subsequently received a sum of 393*l.* representing income of the share received by them after the date of the mortgage, of which sum 254*l.* represented the apportioned part up to that date:—

Held, that the Apportionment Act, 1870, did not apply; that the effect of the clause was to prevent the destination of the income being finally determined until it had actually accrued, i.e., become payable to the tenant for life; and that, although the son or his mortgagee was entitled to the 356*l.*, neither of them was entitled to the 254*l.*

In re Sampson [1896] 1 Ch. 630 applied.

WILLIAM JENKINS, by his will dated March 17, 1893, gave his residuary real and personal estate to his trustees, upon trust to

sell the same, and out of the proceeds to pay his debts and funeral and testamentary expenses and legacies, and to invest the residue, and to stand possessed of the residuary estate and investments representing the same upon trust to pay an annuity of 1000*l.* to his wife for life, and subject to the annuity to hold the trust premises as to each fifth part thereof upon certain trusts. As to one of these fifths, the words of the will were as follows : “(b) As to another equal fifth part thereof not exceeding 5000*l.* in value, hold the same upon such trusts as my said daughter Constance may by deed or will appoint, and, subject thereto, shall pay the income of the said fifth part or the unappointed portion thereof for the time being to my said daughter for her life, and whilst married for her separate use without power of anticipation, and after the death of my said daughter shall pay such portion of such income to any husband of hers who may survive her for his life or any less period as my said daughter may by will appoint, and, subject thereto, shall hold the said fifth part or the unappointed portion thereof upon such trusts and subject to such conditions in favour of any child or children of my said daughter as she may by deed or will appoint, And in default of such appointment” upon trust for the children of Constance attaining twenty-one or being daughters attaining that age or marrying, and in case there should be no child who should attain a vested interest in such part, then upon certain trusts in favour of the children of a deceased daughter of the testator.

After giving two other fifths upon similar trusts in favour of two other daughters and their husbands and children the will proceeded as follows : “(c) As to the remaining fifth part, my trustees shall hold the same upon like trusts and with like powers in favour of my son William, a like power to appoint the income after his death in favour of any widow of his being substituted for the like power given to each of my daughters to appoint in favour of any surviving husband of hers, but, as regards any income for the time being payable to my said son, I direct that the same shall only be paid to him so long as he shall not attempt to assign or charge the same or do or suffer any act whereby the same may become vested in or payable to any other person ; And

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SARGANT J. in the event of the determination of his life interest by any means in his lifetime, I direct that the income which otherwise would have been payable to him may be applied by my trustees, in such manner as they may think fit, in their discretion, for the benefit of my son during his life or of his wife or children if any, and, subject to any such application, shall be accumulated and held upon the same trusts as the capital share of my said son."

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The testator died on May 15, 1895. His son William Jenkins and three daughters survived him, and William Jenkins was married to Mabel Jenkins, and there were two infant children of the marriage.

The value of the one fifth given in trust for William Jenkins was about 15,700*l.*, producing an average income of about 950*l.* per annum.

By an indenture dated February 24, 1913, William Jenkins assigned to his sister Constance G. Jenkins the income arising during his life from his one fifth or other part or share in the residuary estate of the testator by way of mortgage to secure the repayment of moneys amounting in the aggregate to a sum not exceeding 1000*l.*

Notice in writing of this mortgage was given to the trustees on February 25, 1913. At the date of the mortgage there was in the hands of the trustees a sum of 356*l.* 13*s.* 1*d.* representing income of William Jenkins' one fifth share of residue received by the trustees before that date, and at the date of the summons mentioned below there was also in the hands of the trustees a sum of 393*l.* 2*s.* 2*d.* representing the unapplied balance of the income of the one fifth share received by the trustees after the date of the mortgage. Of this latter sum the sum of 254*l.* 6*s.* 2*d.* represented the apportioned part up to the date of the mortgage.

The trustees took out an originating summons raising, *inter alia*, the question whether the sums of 356*l.* 13*s.* 1*d.* and 254*l.* 6*s.* 2*d.*, or either of them, were payable to the mortgagee.

Wilfrid A. Greene, for the plaintiffs, stated the facts and the questions raised for decision.

J. K. Young, for the defendants William Jenkins and Constance Jenkins, his mortgagee. There will be no dispute that

William Jenkins or his mortgagee is entitled to the 35*l.* 13*s.* 1*d.*, SARGANT J. which was received by the trustees before the mortgage deed was executed. That is clearly within the decision of Stirling J. in *In re Sampson*. (1) One of them is also entitled to the 25*l.* 6*s.* 2*d.*, which, although received after the date of the mortgage, accrued due prior to that date. That is also within what Stirling J. apparently thought was the rule in *In re Sampson* (1), although he did not actually so decide. Stirling J. there had in his mind the Apportionment Act, 1870, s. 2 of which says "all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." Sect. 3 is mere machinery, and s. 4 relates to remedies for recovering apportioned parts of income. Sect. 5 says what is to be included under the terms "rents," "annuities," and "dividends" respectively, and s. 6 excludes payments under policies of assurance. The present case comes within the words "other periodical payments in the nature of income." Sect. 7 says that the Act is not to extend to "any case in which it is or shall be expressly stipulated that no apportionment shall take place." The Act of 1870 "extended the principle of the Act of 4 & 5 Will. 4, c. 22, . . . so as to make it applicable to every form of reservation of income, which was in all cases to be treated as if it were interest accruing *de die in diem*, so that there might be no more questions on this subject": *Clive v. Clive*. (2)

[SARGANT J. That does not touch the case where a provision like this is made, that on the happening of certain events the income may be applied for the benefit of the tenant for life.]

If William had died on February 25, 1913, his executors would have been entitled to the income up to that date.

C. Johnston Edwards, for the wife and infant children of William Jenkins. In Jarman on Wills, 6th ed. p. 1511, it is stated that "a clause of forfeiture on bankruptcy or other involuntary alienation does not apply to income which is in the hands of trustees of the will ready for payment to the tenant for

(1) [1896] 1 Ch. 630.

(2) (1872) L. R. 7 Ch. 433, 437.

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SARGANT J. life; if the tenant for life incurs a forfeiture in those circumstances the money belongs to his trustee in bankruptcy or other alienee by operation of law. Whether it applies to income which has accrued, but has not been actually received: in other words, whether the period for determining the destination of the income is the time of its being receivable, or the time of its actual receipt, by the trustees of the will: does not seem to have been decided." Whether there was a vested interest or not is not the point. At the time when the mortgage deed was executed no part of the 393*l.* 2*s.* 2*d.* had been received by the trustees. It would have been covered by the mortgage if that had been effective, and is "income which otherwise would have been payable" to the son, which is within the forfeiture clause. There is nothing in the Apportionment Act which changes the rights of those who take under that charge. *In re Sampson* (1) is an authority in my favour even as to the 254*l.* 6*s.* 2*d.*

SARGANT J., after stating the facts down to and including the notice, to the trustees, of the mortgage, continued as follows: There can be no doubt, and indeed it has been admitted, that the execution of the mortgage caused the discretionary trust to come into effect. At the date of the mortgage the trustees had in their hands 356*l.* 13*s.* 1*d.*, representing income of William's share received by the trustees before that date, and the trustees have also in their hands 393*l.* 2*s.* 2*d.*, representing the unapplied balance of the income of William's share received by them after the date of the mortgage. Of this latter sum 254*l.* 6*s.* 2*d.* represents the apportioned part up to the date of the mortgage.

The summons raises the question whether William Jenkins and his mortgagee are entitled, first, to the sum of 356*l.* 13*s.* 1*d.*, representing income actually received by the trustees previously to the date of the mortgage, and, secondly, to the sum of 254*l.* 6*s.* 2*d.*, representing the apportioned part, down to the date of the mortgage, of income arising from the share of William subsequently to such date. As regards the former sum, the case is admittedly governed by *In re Sampson* (1), which was a considered judgment of Stirling J. That decision, however,

(1) [1896] 1 Ch. 630.

only in terms applied to income which had actually accrued due and had come into the hands of the trustees. It did not expressly deal with the question of the application of the Apportionment Act; it did not expressly decide the question which now arises as to this second sum of 254*l.* 6*s.* 2*d.* Nevertheless I think it is really decisive of the question, as to this second sum, against the tenant for life and his mortgagee. The learned judge refers to a large number of cases in which the question had arisen whether, under wills, a beneficiary's share was divested before he actually received it, and then he says (1): "The cases to which I have referred are not direct authorities in the present case, and the question must be determined on the consideration of the terms of this particular will." The language in that case was very similar to that of the will before me, and no real attempt has been made to discriminate between the two sets of words. Then his Lordship says: "So regarding it, I think that the epoch at which the destination of any instalment of income is to be determined is the moment when that instalment either accrues due or is in the hands of the trustees ready for application in accordance with the trusts of the will."

It seems to me impossible to say that the sum of 254*l.* 6*s.* 2*d.*, representing the apportioned part of the income down to the date of the mortgage, was or represented any instalment of income which had become due or was ready in the hands of the trustees. The very careful language of this clause seems to me to be directed to prevent income being payable to the beneficiary after he has attempted to assign or charge it, and although the words are not sufficient, as was decided in *In re Sampson* (2), to prevent his receiving income which was payable and in the hands of the trustees, or income which had actually accrued due, yet it is a very different question when you have to consider whether the trustees are to look to each instalment of income as it becomes due and to consider what are the different periods during which the respective parts of the instalment have been accruing.

The effect of the clause, I think, is to prevent the destination of the income being finally determined until the time when it has actually accrued due, or, in other words, become payable, and to

(1) [1896] 1 Ch. 636.

(2) [1896] 1 Ch. 630.

SARGANT J. direct the trustees, when dealing with the income, to fix their attention upon the moment of time when the instalment of income has either reached their hands or become payable. I do not think that an instalment or a sum which, if the Apportionment Act had been applied, would have been ultimately payable to the tenant for life is an instalment or a payment of income to which the terms of this clause apply. Accordingly I hold that the sum of 356*l.* 13*s.* 1*d.* is payable to the mortgagee of the tenant for life, and if that sum more than satisfies the mortgage, any surplus will go to the tenant for life. On the other hand, there ought to be no apportionment of the income that was accruing at the date when the mortgage took place.

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Solicitors for plaintiffs : *Rawle, Johnstone & Co., for Cooper & Goodger, Newcastle-upon-Tyne.*

Solicitors for defendants : *E. E. Baron Reed, for C. P. Clarke & Co., Taunton ; H. G. Kenyon, for J. Murray Aynesley, Consett.*

F. E.

SARGANT J.

In re ANSON.

BULLER *v.* ANSON.

1914
July 29.

[1914 B. 963.]

Revenue—Estate Duty—Duty payable by Tenant in Tail who has not barred the Entail—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9, sub-s. 1, 6 ; s. 22, sub-s. 2 (a).

A tenant in tail in possession who succeeds to land and has not barred the entail is “a person having a limited interest” in the property within the meaning of s. 9, sub-s. 6, of the Finance Act, 1894, and when he pays the estate duty on the principal value of the property passing on death to him he is entitled to a first charge for the amount on the property.

THE Right Honourable Sir William Reynell Anson, Bart., was the eldest son of Sir John W. H. Anson, Bart., and under the will of the latter was tenant for life of a portion of the Birch Estate, at Rusholme or Moss Side near the city of Manchester, which, by the same will, was settled, after Sir William’s death without issue, to the use of F. A. Anson (the second son of

Sir John) for life, with remainder to his first and other sons in SARGANT J. tail male, with certain remainders over.

Sir William Anson was also the absolute owner of the other portion of the Birch Estate, and by his will, dated November 26, 1913, he gave certain legacies, including one of 8000*l.* to the first person living at his death who, being his brother F. A. Anson or male issue of his, should succeed him in the baronetcy and become entitled in tail male, under the devise thereafter made, to his real estate if and when he should attain the age of twenty-one years. Sir William then devised those portions of the Birch Estate which were his absolute property and the rest of his real estate to F. A. Anson in tail male, with remainder to Denis George William Anson (the only son of F. A. Anson) in tail male, with a gift in remainder to John H. A. Anson in tail male.

F. A. Anson died in the lifetime of Sir William, who, by a codicil made in January, 1914, appointed Denis Anson an executor in place of F. A. Anson. Sir William died in June, 1914, and Denis G. W. Anson then succeeded to the baronetcy, and, as tenant in tail male, (*a*) to the realty devised by his grandfather, Sir John, and (*b*) to the rest of the Birch Estate and other realty devised by his uncle, Sir William.

Sir Denis G. W. Anson was drowned in the Thames on July 3, 1914, and never executed a disentailing assurance in respect of either estate. On his death Sir John H. A. Anson, an infant, succeeded to the baronetcy, and, as tenant in tail male, to the two estates.

An originating summons was taken out (in the matter of the estate of Sir William Anson) by the Reverend H. G. Buller and J. A. Farrer (the executors of Sir William) and F. H. Anson (he and Mr. Buller being the trustees of the settlement made by the will of Sir John W. H. Anson) against Sir John H. A. Anson, the infant tenant in tail, Mrs. Ella F. O. Crawford (who had obtained letters of administration of the estate of Sir Denis G. W. Anson), and Mrs. Agnes M. Young, the executrix under a recently discovered will of Sir Denis, for the determination of the question: In what proportions, and how and in what way and by whom, the estate duty which became payable in respect of the passing, upon the death of Sir William Anson, of the Birch

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SARGANT J. Estate and other realty and personalty passing under the wills
 1914 of Sir John W. H. Anson and Sir William Anson, ought to be
 ANSON, borne as between the legal personal representative of Sir Denis
In re. Anson, on the one hand, and Sir John H. A. Anson, the present
 BULLER baronet, and the other persons entitled in succession to the
 v. property, on the other hand.
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F. Whinney, for the plaintiffs. By s. 14, sub-s. 1, of the Finance Act, 1894, "in the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person who" properly pays the duty "from the person entitled to any sum charged on such property." By s. 14, sub-s. 2, any dispute as to the proportion of duty to be borne by any property or person may be determined upon application by any person interested in manner directed by Rules of Court, and this application is made under Rules of the Supreme Court, 1883, Order LV., r. 9c. The whole estate duty on Sir William Anson's death became then payable under s. 8, sub-s. 4, of the Act. If his executors pay the duty and recover it against the estate of Sir Denis, they ought to keep his 8000*l.* legacy to recoup themselves if the estate of Sir Denis has to bear the duty. If, on the other hand, Sir Denis, as tenant in tail, is a person having "a limited interest" within the meaning of s. 9, sub-s. 6, his estate on paying the duty would have a charge for the amount on Sir William Anson's estate, and would bear the capital duty payable on both debts, while Sir Denis Anson's estate would only bear the interest on the charge during the period between the two deaths. The question, therefore, really is whether a tenant in tail in possession who has not barred the entail is "a person having a limited interest." The House of Lords has held that an heir of entail in Scotland is such a person and is entitled to a charge on the estate for the duty paid by him: *Lord Advocate v. Countess of Moray*. (1)

Martelli, K.C., and *W. A. Jowitt*, for the defendant Sir John H. A. Anson, the infant tenant in tail. The legacy of 8000*l.* was a gift to Sir Denis for his own benefit absolutely and is

(1) [1905] A. C. 531.

not impressed with a trust to pay the duty of it: *Earl of Mexborough v. Savile*. (1) A tenant in tail, although he has not barred the entail, is not a person having a "limited interest." By s. 9, sub-s. 6, "a person having a limited interest in any property, who pays the estate duty in respect of that property, shall be entitled to the like charge, as if the estate duty in respect of that property had been raised by means of a mortgage to him." There is no definition in the Act of a "limited interest," but by s. 22, sub-s. 2 (a), "a person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property, including a tenant in tail whether in possession or not." Sir Denis could certainly have disposed of the property under his statutory power to bar the entail, without the consent of any other person. A tenant in tail is a "person having a limited interest" according to s. 66 of the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114). The heading of Part XIII. of the Settled Land Act, 1882, and the marginal note to s. 58 of that Act use the expression "limited owners," which includes tenants in tail, and that expression and "limited estate" are to be found in several statutes. "Limited interest" should not be cut down to exclude everything but a fee simple.

Romer, K.C., and *Wilfrid A. Greene*, for Mrs. Crawford and Mrs. Young. Sir Denis Anson, as tenant in tail in possession, was "a person having a limited interest" within the meaning of s. 9, sub-s. 6, of the Act of 1894. In *Lord Advocate v. Countess of Moray* (2) Lord Macnaghten says: "If the land in respect of which the duty was paid had been in England or Ireland, he"—the heir of entail—"would undoubtedly have had a charge for the amount paid." He was evidently referring to the case of a tenant in tail in possession. In s. 22, sub-s. 2 (a), the Legislature is dealing with the question in respect of what property estate duty is to be paid, while s. 9, sub-s. 6, deals with the interest of the person who is to pay the duty; but the Act is not contrasting a "limited interest" with "power to dispose," but is dealing with two different things.

Sect. 1 imposes the duty on the principal value of all property

(1) (1903) 88 L. T. 131.

(2) [1905] A. C. 531, 540.

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SARGANT J. which "passes on the death." Then s. 2, sub-s. 2 (a) and (b), includes in that expression property of which the deceased was competent to dispose and property in which the deceased had a life interest. Sir William Anson's estate was liable because he had a life interest which ceased, and under s. 7, sub-s. 7, the value of "the benefit accruing or arising from the cesser of" the life interest shall, "if the interest extended to the whole income of the property, be the principal value of that property." Then s. 9 adjusts the rights of the persons who have to pay that duty, and a tenant in tail, who has not barred the entail, has to pay the duty, but obtains a charge for the amount on the estate, and only pays himself the interest on that charge.

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SARGANT J. This summons raises the question as to how a large sum of estate duty payable on the death of the late Sir William Anson has to be borne, as between the estate of Sir Denis Anson, who survived Sir William only a few weeks, and the other persons entitled in remainder after Sir Denis Anson. The estates—which are, I have been told, of considerable value—are settled, as to one part, by the will of Sir William Anson himself, under which the first tenant in tail was the late Sir Denis Anson, and, as to the other part, by the will of Sir John Anson. Under the limitations of that will Sir William Anson was tenant for life, and the first tenant in tail in remainder, in the events that happened, was Sir Denis Anson. It is unquestionable that on the death of Sir William Anson estate duty became payable on the whole of the estates, both those estates which passed under his will and those of which he was tenant for life.

Sir Denis Anson having been tenant in tail only under both those dispositions, and having died a few weeks after Sir William Anson without having barred the entail, the question arises whether Sir Denis Anson was "a person having a limited interest" within the meaning of s. 9, sub-s. 6, of the Finance Act, 1894, which provides that "a person having a limited interest in any property, who pays the estate duty in respect of that property, shall be entitled to the like charge, as if the estate duty in respect of that property had been raised by means of a mortgage to him."

In my opinion, Sir Denis Anson, as tenant in tail, had only a SARGANT J. limited interest in the property. It is quite true that he had a statutory power, under the Fines and Recoveries Act, under which he could have enlarged that limited interest to a fee simple or an absolute interest without the consent of any other person, but that very statement seems to me to show that what he had was a limited interest, though it was an interest coupled with the power which permitted of the interest being enlarged. I am not without the assistance of authority here, because in a somewhat similar case which related to the incidence of the same duty with regard to land in Scotland—the case of *Lord Advocate v. Countess of Moray* (1)—Lord Macnaghten expressed a plain view that, if the land in that case had been in England or Ireland, the tenant in tail (and he clearly was talking of a tenant in tail in possession) who had paid the duty would undoubtedly have had a charge for the amount paid.

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In my opinion, therefore, I ought to answer the question raised by the summons by saying that, if the estate duty is paid in respect of this property by the representatives of Sir Denis Anson, they will be entitled to a charge on the property for the amount paid as if a mortgage had been made to Sir Denis to secure the amount. Of course, that will involve his estate keeping down the interest on the sum so raised during the few weeks that he was in fact in possession as tenant in tail.

The question really affects the capital of the settled estates, and if the executors of Sir Denis are prepared to pay the costs of all parties of this application, as between solicitor and client, I think they can raise the amount, together with the amount of the estate duty, by a mortgage under s. 9, sub-s. 5, of the Act. If the money is not raised by mortgage, but merely subsists as a charge, the rate of interest will be 4 per cent. per annum.

Solicitors for all parties: *Walker, Martineau & Co.*

(1) [1905] A. C. 531, 540.

F. E.

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PRINCESS THURN AND TAXIS *v.* MOFFITT.

1914

Oct. 16.

[1914 T. 166.]

Alien Enemy—Right to sue as Plaintiff—Residence in United Kingdom—Registration—Aliens Restriction Act, 1914 (4 & 5 Geo. 5, c. 12)—Aliens Restriction Order, 1914.

An alien enemy's wife resident in the United Kingdom and duly registered under the Aliens Restriction Act, 1914, and Aliens Restriction Order, 1914, can maintain an action in the Courts of this country for the purpose of asserting her individual rights.

Statement of the law in Hall's International Law, 6th ed. p. 388, approved.

THE writ in this action was issued on January 28, 1914, by the plaintiff against Josephine Moffitt as defendant. By her statement of claim the plaintiff, Lida Eleanor, described as "Princess Thurn and Taxis (the wife of Victor, Prince of Thurn and Taxis)," stated that she was the wife of Victor, Prince of Thurn and Taxis, Hereditary Magnate of Hungary, and was married to him on November 1, 1911, being at that time resident in the United States of America; that the defendant, an unmarried woman residing in London, had written and published a number of libels intended to mean that the plaintiff was not the legal wife of Prince Victor, but was living in adultery with him and was falsely and fraudulently assuming a name and title to which she had no right; and claimed an injunction to restrain the defendant from continuing the alleged libels, or in any way acting so as to expose the plaintiff to liability or the risk of litigation in respect of any act or default of the defendant, and damages.

The defendant by her defence denied the statements in the statement of claim and in the alternative pleaded justification. She also stated that the plaintiff was not the lawful wife of Prince Victor, who was legally married to the defendant on October 12, 1906; that the plaintiff had caused to be printed and published words meaning that the defendant was not the legal wife of Prince Victor and had been living in adultery with him and was falsely and fraudulently assuming a name and title to which she

had no right; and herself counterclaimed for an injunction and SARGANT J. damages.

The plaintiff resided at 14, Chesterfield Mansions, Hampstead, in the county of London, and had complied with the requirements as to registration under the Aliens Restriction Act, 1914, and the Aliens Restriction Order, 1914, made thereunder. Prince Victor himself was at the date of the present application an alien enemy resident out of the United Kingdom.

This was an application by the defendant to stay all proceedings by the plaintiff in the action, on the grounds, first, that the plaintiff was an alien enemy and therefore disentitled to any relief from the Court, and, secondly, that the defendant was unable to obtain certain material evidence during the continuance of the state of war.

Maurice Barnett, in support of the application. The plaintiff in this action is in no better position than Prince Victor: Naturalisation Act, 1870 (33 & 34 Vict. c. 14), s. 10, sub-s. 1, which enacts that "a married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject"; and the law is that an alien enemy is not entitled to sue in the Courts of this country during the continuance of a state of war.

H. A. McCardie, for the plaintiff. The suggestion that an alien enemy as such is not entitled to any relief in the Courts of this country is ill-founded and would lead to impossible results. There is ample authority for the proposition that an alien enemy residing in this country with the express or implied licence of the Crown is entitled to the protection of the Courts of this country: *Wells v. Williams* (1); *Janson v. Driefontein Consolidated Mines* (2); *Pitt Cobbett's Cases on International Law*, pt. ii. p. 90; *Boulton v. Dobree* (3); *Alciator v. Smith* (4); *Hall's International Law*, 6th ed. p. 388; *Westlake's International Law*, 2nd ed. pt. ii. p. 54. The language of Sir W. Scott in *The Hoop* (5), to which too wide a meaning has been attributed,

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(1) (1697) 1 Salk. 46; 1 Ld. Raym. Lord Lindley.

282. (3) (1808) 2 Camp. 163.

(2) [1902] A. C. 484, 505, 506, per (4) (1812) 3 Camp. 245.

(5) (1799) 1 C. Rob. 196, 201.

SARGANT J. is addressed to a case where the alien enemy is not resident in the United Kingdom with the permission of the Crown and has no application to the circumstances of the present case. [He also referred to *The Chile* (1) and *The Marie Glaeser*. (2)]

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The effect of registration under the Aliens Restriction Order, 1914, amounts not merely to a permission for the alien enemy to remain in this country, but to a prohibition against his leaving it without permission. Thus by clause 10 an alien enemy cannot embark at an approved port without a permit. By clause 12 the Secretary of State may make an order of deportation. By clause 20 (1.) (b) an alien enemy is bound to furnish particulars of any change of residence, and by clause 22 he may not travel more than five miles from his place of residence without a permit.

Maurice Barnett in reply. The plaintiff has no greater rights than her husband would have had, and the Courts of this country cannot be called on to decide which of these two ladies is the wife of an alien enemy. I do not admit that the registration of the husband himself if he had been resident in the United Kingdom would have been sufficient to enable the plaintiff to maintain this action during the continuance of the war.

SARGANT J. This is an application by the defendant to stay all proceedings by the plaintiff in this action on two grounds, first because the plaintiff is alleged to be an alien enemy and therefore disentitled to any relief in the Courts of this country, and secondly because the defendant alleges that she is unable to obtain certain material evidence during the continuance of the war. The first point is of some general importance. There certainly seems to be a general impression that during the continuance of a state of war an alien enemy as such is not entitled to any relief at law as a plaintiff in the Courts of this country. [His Lordship stated the nature of the present action and continued :] It is not contested that Prince Victor is an alien enemy as being a subject of Austria-Hungary or that he is abroad and probably engaged in fighting against this country; but, although that may be the case so far as Prince Victor is

(1) [1914] P. 212.

(2) [1914] P. 218.

concerned, the plaintiff, who was originally an American lady and has on the view of the facts put forward by her become an alien enemy by virtue of her marriage, resides in the United Kingdom and has duly registered herself under the recent Act and Order in Council. Under that Act and Order the alien enemy suffers certain restrictions upon his ordinary rights of movement; the Secretary of State may order his deportation, and so on, and there can be no doubt that the effect of such registration is to amount at least to a licence to the person to remain in this country; indeed as I gather from the provisions of the Order the permission really amounts to a command to the alien enemy not to depart from this country without some special leave for the purpose. The law applicable to the circumstances is in my opinion correctly stated in Hall's International Law, 6th ed. p. 388, as follows: "When persons are allowed to remain, either for a specified time after the commencement of war, or during good behaviour, they are exonerated from the disabilities of enemies for such time as they in fact stay, and they are placed in the same position as other foreigners, except that they cannot carry on a direct trade in their own or other enemy vessels with the enemy country." That passage is supported by the leading case of *Wells v. Williams*. (1) That being so, I rather gathered that Mr. Barnett admitted that if Prince Victor had himself been resident in this country and had been registered under the Act, the result would have been that the plaintiff would have been entitled to maintain this action. And though he afterwards somewhat receded from this position, he certainly adduced no argument to induce me to depart from the statement of the law to which I have referred. Inasmuch therefore as the plaintiff is coming to insist on a right which is individual to herself, she has in my opinion, by virtue of her registration and by virtue of the permission thereby granted to her to reside in this country, a clear right to enforce that right in the Courts of this country notwithstanding the existence of the state of war. So far therefore as regards the general ground on which this application is based, I overrule the objection raised by the defendant.

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(1) 1 Salk. 46.

SARGANT J. [His Lordship then dealt with the other ground taken by the
 1914 defendant which he also overruled, and made no order on the
 PRINCESS application, except that the defendant should pay the plaintiff's
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Solicitors: *Harrington Edwards & Cobban; Carter Harrison
 & Armstrong.*

A. C.

SARGANT J. JAMES ROSCOE (BOLTON), LIMITED v. WINDER.

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[1913 J. 1879.]

Oct. 27.

*Banker—General Account—Mixing of Trust Funds with Private Moneys—
 Charge on Balance for Trust Funds.*

Payments into a general account cannot, without proof of express intention, be appropriated to the replacement of trust money which has been improperly mixed with that account and drawn out.

A company sold its business to W., who, by the agreement for sale, was to get in the book debts of the business then owing, and, on or before April 30, 1913, to pay over to the company all moneys received by him on account of the book debts, "such amount to be equal to the gross amount of the debts owing on March 1, 1913. Thereafter all debts then outstanding" were to "belong to the purchaser." The gross amount of the book debts so owing was 628*l.* 8*s.* 5*d.*, and W. collected this sum and before or on May 19, 1913, paid 455*l.* 18*s.* 11*d.*, part thereof, into his private general account at a bank. By May 21, 1913, he had drawn out all the money standing to his credit, except 25*l.* 18*s.*, and applied it for his own purposes and not in paying the company as agreed. Subsequently he paid in moneys of his own, and drew on the account for his own purposes, with the result that on his death there was a credit balance of 358*l.* 5*s.* 5*d.* In an action by the company against the trustee of W.'s property under an administration order in bankruptcy the company claimed to have a charge on the 358*l.* 5*s.* 5*d.* for the 455*l.* 18*s.* 11*d.* :—

Held, (1.) that W. was a trustee for the company of the 455*l.* 18*s.* 11*d.*; but (2.) that the company's charge extended only to the intermediate balance of 25*l.* 18*s.*

In re Hallett's Estate (1880) 13 Ch. D. 696 distinguished.

The plaintiff company was in voluntary liquidation and the defendant was the trustee of the property of William Wigham under an administration order in bankruptcy made on July 9, 1913, Wigham having died on June 20, 1913,

By an agreement dated March 13, 1913, Wigham agreed to purchase from the company, for 900*l.*, the goodwill of its business, together with certain assets.

Clause 5 of the agreement was as follows: "The vendors shall permit the purchaser to collect, and the purchaser will collect and get in with all reasonable speed, the book debts of the said business owing at the date hereof without remuneration, and will, on or before April 30 next, pay over to the vendors all moneys received by him on account of such book debts up to that date, such amount to be equal to the gross amount of the debts owing on March 1, 1913, as shown by the books of the vendors. Thereafter all debts then outstanding shall belong to the purchaser."

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Wigham paid only part of the 900*l.*

The gross amount of book debts owing on March 1, 1913, was 623*l.* 8*s.* 5*d.*, and Wigham collected and received this amount, namely, 304*l.* 12*s.*, before April 30, 1913, and 318*l.* 16*s.* 5*d.* after April 30, but before or on May 19, 1913, and out of this Wigham paid 455*l.* 18*s.* 11*d.* into his own banking account on or before the lastly named date. He then drew on the account for his own purposes and not in payment for the book debts to the company, with the result that on May 21, 1913, the banking account was in credit to the extent of 25*l.* 18*s.* only, and with that exception all moneys previously paid into the account had been drawn out by Wigham. He subsequently paid in and drew out other moneys, including two sums of 118*l.* 3*s.* 5*d.* and 196*l.* 13*s.* 6*d.* (making together 314*l.* 16*s.* 11*d.*) paid out on cheques in favour of his wife, with the result that at the time of his death he had a credit balance at the bank of 358*l.* 5*s.* 5*d.*

The 314*l.* 16*s.* 11*d.* had been paid over by the wife (who made no claim to it) to the defendant, and in the present action the plaintiffs claimed (inter alia) a declaration that the plaintiffs were entitled to or alternatively to a lien or charge on the balance of 358*l.* 5*s.* 5*d.* in part payment of or as security for the 455*l.* 18*s.* 11*d.* moneys alleged to have been received by Wigham in trust for the plaintiffs; an order on the defendant to do all acts and things necessary to enable the plaintiffs to be paid the said sums or such part thereof as

SARGANT J. was required to replace the 455*l.* 18*s.* 11*d.* ; and inquiries, accounts, and incidental relief.

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The defendant by his defence said that Wigham's banking account was his general banking account into which moneys from many sources were paid by him, and out of which many payments were from time to time made by him ; that any moneys received on behalf of Wigham on account of the plaintiffs and paid into the bank had been expended by him, and therefore no part of the credit balance of 358*l.* 5*s.* 5*d.* was money received on account of the plaintiffs, except, perhaps, the 25*l.* 18*s.* ; and, while denying liability, the defendant paid into Court the 25*l.* 18*s.*, the credit balance in the bank on May 21, 1913.

Martelli, K.C., and *E. W. Hansell*, for the plaintiffs. Wigham was a trustee for the plaintiffs in respect of the 455*l.* 18*s.* 11*d.* paid by him into his banking account. The plaintiffs therefore can follow it, and have a charge on the balance of 358*l.* 5*s.* 5*d.* standing to Wigham's credit at the time of his death: *In re Hallett's Estate*. (1) Even supposing that all the plaintiffs' money which had been paid in had been drawn out except the small balance of 25*l.* 18*s.*, the charge attaches on moneys subsequently paid in and not drawn out at the time of Wigham's death. The banking account must be looked at as a whole, and the balance from time to time standing to the credit of the account is subject to one continual charge or trust. You cannot, by striking a balance at a certain date and saying that the trust money had then been drawn out, say that the trust does not attach to moneys subsequently paid in. The authority of *In re Hallett's Estate* (1) has never been impugned. It was extended by Joyce J. in *In re Oatway* (2) to investments purchased by the trustee in his own name with moneys drawn from the banking account ; and was also cited several times with approval by the learned Lords in *Sinclair v. Brougham*. (3)

Cyril Atkinson, K.C., and *Frank S. Foley*, for the defendant. The first point is that the money arising from the collection of the book debts was not trust money at all ; the agreement did not

(1) 13 Ch. D. 696.

(2) [1903] 2 Ch. 356.

(3) [1914] A. C. 398.

create the relation of trustee and cestui que trust, but merely SARGANT J. that of debtor and creditor. It may, however, be unnecessary to rely on this defence. This case is distinguishable from *In re Hallett's Estate* (1), for here, with the exception of the small sum we have paid into Court, there is no balance to the credit of the account which can be earmarked as the proceeds of the book debts. All that money, with the exception aforesaid, was drawn out by Wigham. The principle of that case is that the money capable of being followed is a specific sum forming the trust money or part of it. In *In re Hallett & Co.* (2) Davey L.J. says: "In order to follow trust money, there must be specific property capable of being identified, into which the money has been converted, and in that case"—*In re Hallett's Estate* (1)—"this doctrine was applied in this way; it was said that, where a trustee pays his own money and also trust money into his banking account, it is the same thing as though he had placed them in a box, and his drawings for his own purposes must be assumed to be out of his own money. That decision in no way qualifies the rule that there must be a specific thing capable of being followed." The rule is clearly laid down by Wood V.-C. in *Frith v. Cartland* (3), where he says: "The fund the trustee has got must answer the trust to the cestui que trust, so long as there is money remaining from the original transaction, which the Court can trace to fix the trust upon. Therefore it does not come to what was said in argument, that according to that so long as a man has any money in his hands it is to be so treated. . . . Supposing a trustee sells 1000*l.* worth of stock and spends the money instead of re-investing it in other stock, and after that another fund comes to him by way of a legacy, you cannot fasten the trust upon that legacy; the trust fund is gone—it is annihilated; but as long as you can trace it, as long as the trustee has one sixpence of the trust property traced to his hands, trust property it is, and his own title cannot be asserted in any way in respect of it." The money paid into the bank after the trust money had been drawn out was not paid in in execution of the trust and was not impressed with it. The last part of the judgment in *In re Oatway* (4)

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(1) 13 Ch. D. 696.

(3) (1865) 34 L. J. (Ch.) 301, 304.

(2) [1894] 2 Q. B. 237, 244.

(4) [1903] 2 Ch. 356.

SARGANT J. is also in our favour, and the principle laid down in *Frith v. Cart-*
land (1) was acted on by North J. in *In re Stenning*. (2)

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E. W. Hansell in reply.

SARGANT J. This is an action which raises a point connected with the decision in *In re Hallett's Estate* (3), and in which the claim of the plaintiffs, if successful, would result, in my opinion, in a very large extension of the doctrine laid down in that case. [His Lordship referred to the agreement and read clause 5 of it, and continued:] That clause is the really material clause for the present purpose. The gross amount of the book debts owing at the date fixed by the agreement was 623*l.* 8*s.* 5*d.*, and the debtor in fact collected and received that amount. Part of that amount, 304*l.* 12*s.*, was received by him up to April 30, 1913, and the balance, 318*l.* 16*s.* 5*d.*, was received by him after April 30, but before or on May 19, a date the importance of which will appear later. Out of the amount so received by the debtor he paid the sum of 455*l.* 18*s.* 11*d.* into his general banking account, and at the date of his death, on June 20, 1913, that account showed a credit balance of 358*l.* 5*s.* 5*d.*

What is now claimed in the present action (because one or two other points have been given up) is a charge upon the 358*l.* 5*s.* 5*d.* remaining to the credit of the debtor's account at the time of his death, for the sum of 455*l.* 18*s.* 11*d.* received by him in respect of these book debts and paid into his banking account. That is the strict legal way of putting the claim, but, of course, practically it amounts to claiming the full sum of 358*l.* 5*s.* 5*d.*, since that sum is less than the amount of the charge claimed.

The first point that was taken against the claim was that no trust was created by the agreement as to the book debts to be collected under it. In my opinion, that objection cannot be sustained. It seems to me that the true effect of clause 5 of the agreement is that the purchaser is throughout collecting the book debts on behalf of the vendors, and that he has to pay over the money received on account of the book debts; the language of the clause is express in that respect. No doubt, he has on

(1) 34 L. J. (Ch.) 301, 304.

(2) [1895] 2 Ch. 433.

(3) 13 Ch. D. 696.

April 30 to make up to the vendors the full amount of the book debts if he has not by that time received them himself. That is a personal obligation on his part to make up the deficiency, but I do not think that in any way affects his obligation to hand over the actual book debts to the vendors so far as he does in fact receive them. And, incidentally, I think that the concluding words of clause 5, "thereafter all debts then outstanding shall belong to the purchaser," do not mean after April 30, but after the time when the purchaser shall have fulfilled his obligation to make up the deficiency of the book debts collected by him to the full amount. Accordingly, so far as the purchaser did collect these book debts, he did, in my opinion, hold the amount in trust for the vendors.

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That being so, we have a case where, as in *In re Hallett's Estate* (1), the banking account of the debtor comprised not only moneys belonging to himself for his own purposes, but also moneys belonging to him upon trust for some one else, and that being so, and apart from the circumstance I am going to mention, it seems to me clear that the plaintiffs would be entitled to the charge they claim, and to receive the whole balance of 358*l.* 5*s.* 5*d.* standing to the debtor's credit at the time of his death, and that although there had been payments out of the account which, under the rule in *Clayton's Case* (2), would have been attributable to the earlier payments in.

In re Hallett's Estate (1), which would but for the circumstance I am going to mention entirely conclude this case, decided two clear points: First, that when a trustee mixes trust moneys with private moneys in one account the cestuis que trust have a charge on the aggregate amount for their trust fund; and, secondly, that when payments are made by the trustee out of the general account the payments are not to be appropriated against payments in to that account as in *Clayton's Case* (2), because the trustee is presumed to be honest rather than dishonest and to make payments out of his own private moneys and not out of the trust fund that was mingled with his private moneys.

But there is a further circumstance in the present case

(1) 13 Ch. D. 696.

(2) (1816) 1 Mer. 572.

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SARGANT J. which seems to me to be conclusive in favour of the defendant as regards the greater part of the balance of 358*l.* 5*s.* 5*d.* It appears that after the payment in by the debtor of a portion of the book debts which he had received the balance at the bank on May 19, 1913, was reduced by his drawings to a sum of 25*l.* 18*s.* only on May 21. So that, although the ultimate balance at the debtor's death was about 358*l.*, there had been an intermediate balance of only 25*l.* 18*s.* The result of that seems to me to be that the trust moneys cannot possibly be traced into this common fund, which was standing to the debtor's credit at his death, to an extent of more than 25*l.* 18*s.*, because, although prima facie under the second rule in *In re Hallett's Estate* (1) any drawings out by the debtor ought to be attributed to the private moneys which he had at the bank and not to the trust moneys, yet, when the drawings out had reached such an amount that the whole of his private money part had been exhausted, it necessarily followed that the rest of the drawings must have been against trust moneys. There being on May 21, 1913, only 25*l.* 18*s.*, in all, standing to the credit of the debtor's account, it is quite clear that on that day he must have denuded his account of all the trust moneys there—the whole 455*l.* 18*s.* 11*d.*—except to the extent of 25*l.* 18*s.*

Practically, what Mr. Martelli and Mr. Hansell have been asking me to do—although I think Mr. Hansell in particular rather disguised the claim by the phraseology he used—is to say that the debtor, by paying further moneys after May 21 into this common account, was impressing upon those further moneys so paid in the like trust or obligation, or charge of the nature of a trust, which had formerly been impressed upon the previous balances to the credit of that account. No doubt, Mr. Hansell did say “No. I am only asking you to treat the account as a whole, and to consider the balance from time to time standing to the credit of that account as subject to one continual charge or trust.” But I think that really is using words which are not appropriate to the facts. You must, for the purpose of tracing, which was the process adopted in *In re Hallett's Estate* (1), put your finger on some definite fund which either

(1) 13 Ch.¹D. 696.

remains in its original state or can be found in another shape. That is tracing, and tracing, by the very facts of this case, seems to be absolutely excluded except as to the 25*l.* 18*s.*

Then, apart from tracing, it seems to me possible to establish this claim against the ultimate balance of 358*l.* 5*s.* 5*d.* only by saying that something was done, with regard to the additional moneys which are needed to make up that balance, by the person to whom those moneys belonged, the debtor, to substitute those moneys for the purpose of, or to impose upon those moneys a trust equivalent to, the trust which rested on the previous balance. Of course, if there was anything like a separate trust account, the payment of the further moneys into that account would, in itself, have been quite a sufficient indication of the intention of the debtor to substitute those additional moneys for the original trust moneys, and accordingly to impose, by way of substitution, the old trusts upon those additional moneys. But, in a case where the account into which the moneys are paid is the general trading account of the debtor on which he has been accustomed to draw both in the ordinary course and in breach of trust when there were trust funds standing to the credit of that account which were convenient for that purpose, I think it is impossible to attribute to him that by the mere payment into the account of further moneys, which to a large extent he subsequently used for purposes of his own, he intended to clothe those moneys with a trust in favour of the plaintiffs.⁴

Certainly, after having heard *In re Hallett's Estate* (1) stated over and over again, I should have thought that the general view of that decision was that it only applied to such an amount of the balance ultimately standing to the credit of the trustee as did not exceed the lowest balance of the account during the intervening period. That view has practically been taken, as far as I can make out, in the cases which have dealt with *In re Hallett's Estate*. (1) *In re Oatway* (2), a decision of Joyce J., was cited to me in support of the plaintiffs' case, but I do not find anything in it to help them. All that Joyce J. did in that case was to say that, if part of the mixed moneys can be traced into a definite security, that security will not become freed from the charge in

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(1) 13 Ch. D. 696.

(2) [1903] 2 Ch. 356.

SARGANT J. favour of the trust, but will, together with any residue of the mixed moneys, remain subject to that charge. I am sure that nothing which he said was intended to mean that the trust was imposed upon any property into which the original fund could not be traced. The head-note to the decision of North J. in *In re Stenning* (1) (which accurately represents the effect of the case) is stated in such terms as to indicate that the application of the doctrine in *In re Hallett's Estate* (2) implied that there should be a continuous balance standing to the credit of the account equal to the balance against which the charge is sought to be enforced. And certainly in the recent case of *Sinclair v. Brougham* (3) I can see nothing in any way to impeach the doctrine as to tracing laid down in *In re Hallett's Estate*. (2)

In my opinion, therefore, the only part of the balance of 358*l.* 5*s.* 5*d.* which can be made available by the plaintiffs is the sum of 25*l.* 18*s.*, being the smallest amount to which the balance, to the credit of the account had fallen between May 19, 1913, and the death of the debtor.

Solicitors : *Woodcock Ryland & Parker*, for *Russell & Russell*, Bolton ; *D. H. Pettitt*, for *F. W. Brockbank*, Bolton.

(1) [1895] 2 Ch. 433.

(2) 13 Ch. D. 696.

(3) [1914] A. C. 398.

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Town Moor—Freemen's Right to depasture Cattle on Moor—Stint Tickets—Transferees of Stint Tickets—Temperance Festival on Moor—Roundabouts and Shows—"Fair"—Injury to Herbage—Injunction—Measure of Damages—Town Moor Act, 1774 (14 Geo. 3, c. cv.), ss. 1, 3, 4—6, 7, 8, 10—Newcastle-upon-Tyne Improvement Act, 1870 (33 & 34 Vict. c. cxx.), ss. 6, 7, 8, 11, 12, 17, 19.

By special Acts of 1774 and 1870 the right of resident freemen and widows of resident freemen of the town of Newcastle-upon-Tyne to depasture two milch cows each on the Town Moor was established and regulated, the number of cows to be depastured in any one year on the moor being limited to 800, and every freeman and widow of a freeman was entitled in April of each year on application to their stewards and wardens to a stint ticket for two milch cows to be depastured on the moor, which was transferable to any resident inhabitant of the town, but no person was to hold more than ten such tickets. In 1912 the area of the moor available for pasturage was insufficient to carry the statutory number of cows.

The Act of 1774 authorized the corporation at the request of the stewards and wardens from time to time to grant leases of parts of the Town Moor for the purpose of improving the same, but s. 7 enacted that no lease should be granted of that part of the Town Moor called the Cowhill and such part adjoining the same as should be necessary for holding the Cowhill fairs, nor of another part of the moor called the Race ground, nor of any part of the moor where any booths, stalls, and other erections had been set up during the holding of the said fairs or horse races, but the same should be preserved for fairs and horse races as theretofore. The Act of 1870 (s. 6) constituted a committee of the stewards and wardens, to be elected annually, to act for the stewards and wardens and for the freemen and widows of freemen for all purposes relating to the Town Moor, and (s. 8) authorized the committee and the corporation from time to time to enter into agreements for the appropriation of parts of the Town Moor for not exceeding ten days at a time for agricultural shows or other public purposes.

Prior to 1882 horse races with attendant roundabouts and shows had for many years been held on the race ground on the Town Moor, but in that year they were and ever since had been held elsewhere. From 1882 down to 1912 a temperance festival with attendant roundabouts and shows was annually held on the old race ground on the moor with the joint consent of the committee and of the corporation, and had grown into a very large gathering of many thousands of people. In 1912 the heavy traction engines used by the defendants to bring their roundabouts and shows to the festival cut up the surface of the moor and seriously damaged the herbage; consequently, in 1913 the

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committee, while consenting to the festival being held as usual on the moor, declined to join with the corporation in granting a licence to the defendants to bring their roundabouts and shows on to the moor for the festival. The corporation nevertheless granted the defendants a licence for that purpose, and damage ensued to the herbage. Most of the holders of stint tickets for the years 1912 and 1913 were not freemen but persons who had purchased tickets from freemen. In an action by the committee against the defendants for an injunction to restrain them from bringing their roundabouts and shows on to the moor, and for damages, the corporation not being parties to the action :—

Held (affirming the decision of Neville J. [1914] 2 Ch. 293), that neither the horse races nor the temperance festival with the attendant roundabouts and shows was a fair within the meaning of s. 7 of the Act of 1774, and that the corporation had no power under either of the Acts to grant the licence to the defendants without the consent of the plaintiffs; and that the measure of damages was the amount of injury to the herbage, irrespective of whether the stint ticket holders were or were not freemen.

APPEAL from a decision of Neville J. (1)

The Corporation of Newcastle-upon-Tyne were the owners in fee simple of the soil of the Town Moor, subject to the right of the resident freemen or burgesses and resident widows of deceased freemen or burgesses of the town (hereafter referred to as “the freemen”) to the herbage of the Town Moor for two milch cows each.

This right of the freemen to depasture two milch cows respectively on the Town Moor was known as “the herbage right.”

The Town Moor Act, 1774 (14 Geo. 3, c. cv.), after reciting litigation with respect to the herbage right, by s. 1 established and confirmed to the freemen for ever the full right to the herbage of the Town Moor “for two milch cows respectively in such manner as has been used, subject to such demises, restrictions, and regulations for the culture and improvement of the Town Moor as hereinafter mentioned.”

Sect. 3 authorized the inclosure from time to time of part of the Town Moor for improvement, the quantity to be inclosed for such improvement not to exceed 100 acres at any one time.

Sects. 4 to 6 empowered the stewards and wardens of the several companies of the town of Newcastle-upon-Tyne and the

corporation to grant leases of any part of the Town Moor, not exceeding 100 acres, proposed to be inclosed for improvement, and s. 8 directed that the rents reserved by such leases should be distributed amongst the poor freemen not having any cow upon the Town Moor.

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Sect. 7 provided that no demise should be made by virtue of the Act "of a certain parcel of the said Town Moor called the Cowhill, and such part of the Town Moor adjoining the same, as shall be necessary for holding the fairs commonly called the Cowhill Fairs, nor of another parcel of the Town Moor called the Race ground, nor of any part of the Town Moor lying within the inner ditches of the said Race ground . . . nor on any part of the said Town Moor where any booth or booths, stall or stalls, stand or stands, hut or huts, or other temporary erections have been usually made or set up during the holding of any of the said fairs or horse races respectively; but the same shall be preserved for fairs and horse races as heretofore, anything herein contained to the contrary thereof in any wise notwithstanding."

Sect. 10 enacted that "nothing in this Act contained shall extend or be construed to extend to take away, annul, or alter any of the rights which the Corporation of Newcastle-upon-Tyne, as owners of the said Town Moor . . . are entitled unto, or to give to them any new or other rights than they are now entitled to."

The Newcastle-upon-Tyne Improvement Act, 1870 (33 & 34 Vict. c. cxx.), after reciting, amongst other things, the herbage right and the Act of 1774, and that the Town Moor might be made much more beneficial to the borough than it then was if it were placed under a better system of management, enacted:—

Sect. 6. "There shall be for the purposes of this Act a committee of the stewards and wardens chosen out of and by the general body of stewards and wardens on Michaelmas guild day in each year . . . and consisting of nine members, of whom three shall be a quorum, which committee shall be by virtue of this Act authorized and required to act for and on behalf of the stewards and wardens and freemen and widows of freemen for all purposes relating to the Town Moor."

Sect. 7 empowered the corporation to appoint out of the

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council a committee to whom they might delegate for twelve months such of the powers and duties of the corporation under the Act as related to the Town Moor.

Sect. 8. "The corporation and the committee of stewards and wardens may from time to time enter into and carry into effect such agreements as they may think fit for the purposes in this section of the Act mentioned in relation to the Town Moor, and in particular, but not so as to affect the generality of this provision, for, amongst other things, . . . the appropriation of part or parts of the Town Moor for the space of not exceeding ten continuous days for the purposes of agricultural shows, public reviews, or other public purposes . . . and all such agreements shall be binding on the corporation and the stewards and wardens and the freemen and widows respectively . . ."

Sect. 11 repealed the provision in the Act of 1774 which required every resident freeman or resident widow of any freeman, before depasturing any cow on the Town Moor, to state on oath that the cow was his or her property; and, after limiting the number of cows to be depastured upon the Town Moor in any one year to 800, provided for the issue of stint tickets to every freeman applying for the same before April 1 in each year. If there were more applicants than tickets, then there was to be a ballot, and the successful applicants at the ballot were to receive stint tickets to depasture cows upon the Town Moor for one year from May 12 then next on prepayment of a certain sum to be applied in discharge of the necessary expenses of herding and otherwise respecting the cows depastured upon the Town Moor, and the several holders of stint tickets might "transfer the same to any resident inhabitant of the borough for such consideration as they may think fit, so as no one person do hold more than ten of such tickets."

Sect. 12 provided for the annual payment of 400*l.* out of the borough funds to the committee of stewards and wardens to be applied by them in draining and improving the herbage of the Town Moor.

Sect. 17 directed (*inter alia*) that all money paid for the erection of tents and stands upon the Town Moor during the holding of races and fairs should be paid to the corporation, who

should thereout defray the expense of reinstating the ground that might be damaged or injured, and other incidental expenses, and might pay over the surplus in aid of the race fund as theretofore accustomed.

Sect. 19 provided that nothing in the Act contained should in any way prejudice, vary, alter, or affect the positions and reservations contained in the Town Moor Act, 1774, relating to the holding of races and fairs and the erection of tents and stands on such occasions.

For very many years prior to 1882 the Newcastle races were held annually on the race ground on the Town Moor, but in that year they were and ever since they had been held annually at Gosforth Park during the last week in June. In 1882 the committee of stewards and wardens and the corporation jointly concurred in granting permission for a temperance festival to be held on the Town Moor during the last week in June, and in granting a licence to certain persons who had attended the races in previous years, to attend the festival with their roundabouts and shows. From 1882 down to and including the year 1912 this festival with its attendant roundabouts and shows had been annually held on the Town Moor during the last week in June with the joint consent of the committee and corporation, and had gradually grown into a gathering of very large proportions. The year 1912 was very wet and the surface of the Town Moor was much cut up by the heavy traction engines and other vehicles used by the defendants, who were amusement caterers, in bringing their roundabouts and shows to the festival, and the herbage was seriously damaged. Consequently the committee in the spring of 1913, while consenting to the festival being held as usual on the Town Moor during the last week in June, declined to concur in granting a licence to the defendants to bring their roundabouts and shows to the festival on the ground that, having regard to the injury done to the herbage the previous year, it was essential in the interests of the freemen that the moor should have an entire rest, and that there should be no letting that year. The corporation nevertheless granted the defendants a licence in writing to bring their roundabouts and shows to the festival in consideration of 1050l.,

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the defendants covenanting to do as little damage as possible to the herbage and soil of the Town Moor and to make good such damage to the satisfaction of the city engineer, and the corporation covenanting to indemnify the defendants against the costs of and to defend all proceedings that might be brought against the defendants by any person or persons. Thereupon the plaintiffs, being the committee of stewards and wardens appointed under the Act of 1870, and suing for and on behalf of the stewards and wardens and for and on behalf of the freemen and widows of freemen in the Act mentioned, issued a writ against the defendants on May 27, 1913, claiming an injunction to restrain the defendants from bringing their roundabouts and shows on to the Town Moor, and on June 13, 1913, Neville J., on the application of the plaintiffs, granted an interlocutory injunction; but on June 20 the Court of Appeal, without expressing any opinion on the construction of the Acts, discharged the injunction, and the defendants attended the festival held that month with their roundabouts and shows, and damage was done to the herbage.

The plaintiffs by their statement of claim pleaded the herbage right as established by the Act of 1774 and varied by the Act of 1870, and alleged that the herbage on the moor was insufficient in any one year to support 800 cows; that as the statutory committee chosen under s. 6 of the Act of 1870 they were suing for and on behalf of the stewards and wardens and for and on behalf of the freemen; that no agreement under s. 8 of the Act of 1870 had been entered into between them and the corporation; that the defendants were showmen and threatened and intended without the leave of the plaintiffs to enter upon the Town Moor and to place thereon divers steam engines, shows, caravans, exhibitions, booths, tents and other things of a like nature, and to use and occupy a part or parts of the Town Moor to the exclusion of the cows of the said freemen whereby the said freemen would not be able to enjoy the herbage right belonging to them in as ample and beneficial a manner as they hitherto had done and were entitled to do; that since the commencement of the action the defendants had entered upon and occupied a part of the Town Moor to the damage of the said freemen; and the

plaintiffs claimed an injunction to restrain the defendants and their servants from bringing on to any part of the Town Moor over which the resident freemen and resident widows of freemen of the city of Newcastle-upon-Tyne had the right to herbage any steam engine, show, caravan, exhibition, booth, tent, or other thing of a like nature; and damages.

By their defence the defendants did not admit that the herbage on the Town Moor was not sufficient in any one year to support 800 cows, nor that the plaintiffs had not entered into any agreement with the corporation under s. 8 of the Act of 1870. They justified their entry upon and occupation of part of the Town Moor for the purpose of erecting the roundabouts and shows during the last week in June, 1913, under a licence granted them by the corporation dated June 4, 1913, whereby they had undertaken to do as little damage as possible and to make good all damage to the satisfaction of the city engineer. They referred to s. 7 of the Act of 1774 and ss. 17 and 19 of the Act of 1870, and alleged that the temperance festival with its attendant roundabouts and shows constituted a fair within the meaning of the Acts of 1774 and 1870, and had always been held on that part of the Town Moor lying within the inner ditches of the race ground; that the plaintiffs had wrongfully refused their consent to the licence of June 4, 1913, and under circumstances which justified the corporation in dispensing with such consent. With respect to the alleged damage to the freemen, they pleaded that not more than 160 milch cows had for some time past been depastured on the Town Moor; that the freemen had no right of pasture over the Town Moor for cows other than milch cows, and, though they used the Town Moor for depasturing cows other than milch cows, such user was wrongful and conferred upon them no right to any relief by injunction or damages; and they alleged that in pursuance of their said undertaking they had effectually made good the damage (if any) occasioned by their occupation of the Town Moor under the licence of June 4, 1913, and that the plaintiffs were amply indemnified in respect of such damage by their said undertaking. The corporation were not made parties to the action, but had passed a resolution instructing the town clerk to defend the action.

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It appeared from the evidence that the acreage of the Town Moor available for the herbage right had been reduced from about 1260 acres in 1870, by reason of parts taken from time to time for various purposes under statutory powers, to about 848 acres, and that each milch cow required two acres for pasture; that the site occupied in June, 1913, by the temperance festival and its attendant roundabouts and shows was about seventy-eight acres, of which twenty-three acres overlapped the site that had been occupied by the festival in 1912; that the plaintiffs had expended considerable sums in restoring the herbage of the 1912 site, and that the restoration of the twenty-three acres had been retarded by their being again occupied in 1913 by the festival; that about 169 cows had been depastured on the Town Moor during 1912-13, and that most of the owners of these cattle were not freemen but persons to whom freemen had sold their stint tickets.

Neville J. granted an injunction and 214*l.* damages. (1)

The defendants appealed.

Peterson, K.C., and *Dighton Pollock*, for the appellants. The rights of the parties on this appeal depend upon the construction of the special Acts of Parliament of 1774 and 1870. In the first place it is submitted that the committee have no right to sue on behalf of the stint ticket holders, who constitute the majority of the persons alleged to have been injured. Under the Acts the committee are not authorized to represent them. Nor can they sue in respect of damage done in 1912-13, for the present owners of the right of pasture are a different body from those in that year, and the damage had been made good in the ordinary course of nature before the present ticket holders obtained their rights. The committee cannot sue on behalf of some only of the freemen. A representative action to recover these damages is not maintainable: Rules of the Supreme Court, 1883, Order xvi., r. 9; Annual Practice, 1915, p. 235, note; *Markt & Co. v. Knight Steamship Co.* (2) This festival was a "fair" within s. 7 of the Act of 1774, and the corporation had power to grant the licence to the appellants without the consent of the

(1) [1914] 2 Ch. 293.

(2) [1910] 2 K. B. 1021.

plaintiffs: *Collins v. Cooper*. (1) The freemen themselves have no estate or exclusive possession, such as herbage, but only a right to turn out a limited number of cows to eat the grass; and the damage they have suffered, if any, is very small. The stint ticket holders are not represented by the committee, and loss to them cannot be taken into consideration in assessing damages.

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Upjohn, K.C., Jenkins, K.C., and Stuart Moore, for the plaintiffs. This action might be brought under Rules of the Supreme Court, 1883, Order xvi., r. 1, but, apart from that rule, s. 6 of the special Act of 1870 enables us to maintain it. We are entitled to damages for the loss caused by the wrongful use of the surface of the moor: *Whitwham v. Westminster Brymbo Coal and Coke Co.* (2) No one is allowed to make a profit out of his own wrong; although the measure of damages is not the amount of profit made by him, but the loss sustained by the claimant. The 1050*l.* paid to the corporation for the licence ought to be taken into consideration as an indication of value. The special Acts vest a right of herbage in the freemen, and they are represented by the committee for all purposes relating to the moor. It is clear that this is a question "relating to the Town Moor"; so the exact nature of the right is immaterial.

[KENNEDY L.J. referred to Co. Litt. 4b on the form of action maintainable by the owner of herbage.]

We only have to show that we have such a right as enables us to maintain this action and that our grass has been injured: *Robertson v. Hartopp*. (3) The injury has been to the freemen, not to the ticket holders. The rights of the freemen are not confined to turning out cattle; they can control the letting and selling of parts of the moor. Everything below the surface belongs to the corporation, but they are not owners in the ordinary sense. The licence gave the appellants no property: *Heap v. Hartley*. (4) No substantial wrong or miscarriage within the Rules of the Supreme Court, 1883, Order xxxix., r. 6, has been shown to result from the order appealed from.

Peterson, K.C., in reply. The freemen cannot sue for damages

(1) (1893) 68 L. T. 450.

(3) (1889) 43 Ch. D. 484, 500.

(2) [1896] 1 Ch. 894; [1896] 2

(4) (1889) 42 Ch. D. 461, 470.

C A. which have not been sustained by them but by the ticket holders.
 1914 The committee are not in the position of trustees ; no property
 WALKER is vested in them ; they only represent the freemen : *Laws v.*
 v. *Eltringham.* (1)
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Cur. adv. vult.

Nov. 6. LORD COZENS-HARDY M.R. The Town Moor at Newcastle is subject to two Acts of Parliament passed in 1774 and in 1870. There had been disputes between the corporation and the freemen as to their respective rights. The result of the two Acts is that the exclusive right to the "herbage" of the moor is given to the freemen, in which word I include resident widows of freemen, though the soil is in the corporation. Provisions are made authorizing the corporation and the freemen, acting through their statutory committee, to sanction the appropriation of parts of the moor for "public purposes" for not more than ten continuous days. But there is nothing in the Acts which can authorize the corporation alone to interfere with the rights of the freemen.

The defendants are showmen who paid 1050*l.* to the corporation for a licence to take exclusive possession of a large tract of the moor, the precise extent of which does not appear, but which seems to be about seventy-eight acres, and undertook to make good the damage. The licence is dated June 4, 1913. It was granted without the consent of the freemen, and after the institution of this action, the writ in which was issued on May 27. On an interlocutory application the show was allowed to take place, an undertaking being given. In my opinion it is clear that the defendants cannot justify their trespass under the licence from the corporation. It was faintly sought to justify it on the ground that the show was a "fair" within s. 7 of the Act of 1774, but this is impossible when the whole section is read.

Neville J. has granted an injunction in effect restraining the defendants from bringing any show on to the moor without the consent of the plaintiffs, who are the committee appointed under s. 6 of the Act of 1870. I think this was quite right.

The question of damages presents more difficulty. The

learned judge has awarded 214*l.* for damages, but it is not clear how that sum was arrived at.

According to the statutory provisions and the by-laws made thereunder "stint tickets" are issued each year to freeholders who apply and make certain payments, or to persons being residents to whom they transfer their rights. The tickets are for one year only, from May to May. Each ticket enables the holder to turn out two cows, subject to certain restrictions. It is contended (*a*) that the persons who were damnified by the trespass in the year 1913-14 are not the same as the ticket holders in 1914-15; (*b*) that the ticket holders are not all freemen, the transferees being numerous, and that the plaintiffs who are the committee do not represent those ticket holders who are not freemen under s. 6 of the Act of 1870; (*c*) that the freemen have no estate or exclusive possession, such as herbage, but only a right to turn out a limited number of cows to eat the grass; (*d*) that the damage to the herbage in June, 1913, was partly temporary in the sense that by May, 1914, the herbage was restored to its usual condition, and that it is only in respect of the damage which was not made good by nature before May, 1914, that any legal claim can be established in this action; and in particular that damages for wrongfully taking exclusive possession of about seventy-eight acres in June, 1913, cannot be recovered in 1914-15, the ticket holders being a different class each year.

I am not sure that it is necessary to consider all these points. For it seems to me that the freemen have either an estate (herbage), or an exclusive right to the whole pasturage. In either view their rights have plainly been interfered with.

Sect. 6 of the Act of 1870 constitutes a committee "for the purposes of this Act . . . which committee shall be by virtue of this Act authorized and required to act for and on behalf of the stewards and wardens and freemen and widows of freemen for all purposes relating to the Town Moor." One of those purposes is to guard the interests of the stint ticket holders, whether freemen or not. I think the committee are in substance in the position of trustees. It is true they have not the herbage vested in them, but they have a statutory right to assert and regulate and defend the

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rights of all freemen and all ticket holders. Any money they recover by way of damages they must apply in accordance with law. They have a lien upon money recovered for their costs, and subject thereto they must apply the surplus for the benefit of the persons interested. The defendants, who are wrong-doers, cannot go into this question. If the committee have a difficulty, they can apply to the Court for directions as to the disposition of the surplus.

I gather, though it is not quite certain, that the learned judge has held the plaintiffs entitled to damages for 1913-14, and also for 1914-15. In my opinion this was right. The evidence amply justifies an award of damages under those two heads of more than 214*l*. He has not considered the question of damages for exclusive possession, apart from actual damage to the herbage. It is not necessary in order to support the judgment to express any opinion upon this head of damages.

I think the appeal fails and must be dismissed with costs.

KENNEDY L.J. stated the facts and continued: It appears to me to be clear that the Corporation of Newcastle can show no legal right to make, as it did, against the will of the plaintiffs, in the spring of 1913, an agreement with the defendants, who are showmen and owners of steam engines, roundabouts, caravans, and the like appliances for village and suburban festivals, which authorized the defendants in June of that year to enter upon and use a considerable portion of the grass-bearing surface of the Town Moor. The result of the use of that surface—in all, I think, some seventy-eight acres—under the agreement was not only to exclude therefrom for a certain period in that month the cows of the resident freemen and resident widows of deceased freemen and of those who under s. 11 of the Act of 1870 (to which I shall refer later on) were transferees for the year 1913-14 of “stint” (or pasturage) tickets from those persons, but also to do, as Neville J. has found, serious damage to the herbage over the whole area used by the defendants. Over a certain portion of that area—some twenty-three acres—the damage to the herbage was aggravated by the fact that a temperance festival had been held upon it in 1912, and owing to the exceedingly wet weather it

had been so much injured thereby that the herbage had not, in spite of the expenditure of much labour and expense, recovered when the defendants occupied the ground in 1913, with the result that the labour and expense were practically thrown away and the herbage in 1914-15 still remained in a damaged state.

I hope that I am doing no injustice to the case put forward by the defendants if I say that the only plea of right which was seriously urged was founded on s. 7 of the Act of 1774, which preserved to the corporation the right to use a certain parcel of the Town Moor on which (in the words of the Act) "the fairs commonly called the Cowhill Fairs" had been held and another parcel called the race ground, and a space lying within forty yards of the outer ditches of the race ground as well as any part of the Town Moor where any booths, stands, huts, or other temporary erections had been usually made or set up during the holding of any of the said fairs or horse races respectively. This attempted justification appears to me to be baseless. The festival for which the corporation gave possession of some seventy-eight acres of the Town Moor to the defendants was not a horse race nor the fair "commonly called the Cowhill Fair." I do not think that, in the sense in which "fair" ought to be understood where it occurs in this statutory provision, it was a "fair" at all. I concur, in regard to the case of *Collins v. Cooper* (1), in the view expressed by Neville J. in regard to the judgments of the members of the Divisional Court on that occasion.

So far as the defendants have sought to resist the decree for an injunction for which the plaintiffs asked in their writ and statement of claim, I feel no difficulty in holding that the defence fails, and that they could not successfully resist the plaintiffs' claim.

The question of damages, which my brother Neville has assessed at the sum of 214/., is not quite so simple, and we have had the advantage of listening to a considerable amount of argument upon this part of the case; but, except upon one point made by the plaintiffs' counsel on the hearing in this Court, I do not think that anything material has been added to the contentions with which Neville J. has clearly and concisely dealt in

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the latter portion of his judgment. Whether the interest of the resident freemen and the resident widows of deceased freemen described in the third part of the preamble of the Act of 1870 as "the right or benefit of herbage" and referred to in that Act as "the herbage right" is "*herbagium terrae*" in the technical sense for which Mr. Upjohn contended or "*vestura terrae*" (and in either case the grantee has a remedy by action of trespass, *quare clausum fregit*), I cannot entertain any doubt that they are, as a body, entitled, suing by the present plaintiffs as their statutory representatives, to recover by action pecuniary amends for injury done by any one who without lawful authority entered upon and damaged the herbage or any part of the Town Moor which is not a part included in the areas to which the demises, reservations, and restrictions authorized by the statutes of 1774 and 1870 are applicable. To the resident freemen and resident widows of freemen belongs the exclusive right to the whole pasturage. Neville J., who heard the evidence given on this point at the trial, has found as a fact "that serious damage to the herbage of the moor was occasioned is beyond dispute." He has assessed that damage so far as it is recoverable by the plaintiffs in this action at 214*l*. In arriving at that figure he tells us in his judgment that he has taken into account damage which was involved to all the freemen—under which word he intends, of course, to include the resident freemen and resident widows of freemen—for the year 1914-15. To that head of damage, the nature of which the learned judge states clearly in the latter part of his judgment, the learned counsel for the appellants were unable to suggest any tenable ground of objection. But they urged that the figure of 214*l*. is not wholly referable to this head of damage; it includes some amount for damage claimed by the plaintiffs in respect of injury in 1913-14, and to that extent cannot be sustained, because for that year the larger, if not much the larger, number of those who were injured by damage to the herbage consisted, not of resident freemen or resident widows of freemen, but of other resident inhabitants who for valuable consideration took transfers from them of their "stint" ballot tickets under s. 11 of the Act of 1870, and as such transferees became the persons to whom, in place of their transferors,

all interest in the herbage passed for that year, and upon whom, therefore, and not upon the transferors, any damage for that year fell. These transferees, say the defendants, are not parties to this action, neither are they persons for whom the plaintiffs can be treated as suing in a representative capacity; and, therefore, in so far as injury to the pasturage for 1913-14 has formed an element in the assessment of damages, those damages have been erroneously assessed. Now, although the form of words rather favours the view, I am not sure that, when Neville J. stated in his judgment that he took damage under the head of injury caused to all the freemen for the year 1914-15 into account in considering the amount of damages which he estimated in the whole at 214*l.*, he intended it to be inferred that he also took into consideration the injury to pasturage for the year 1913-14. If I rightly understand the figures given by the two experts called by the plaintiffs at the hearing, there was evidence before the learned judge, if he accepted it, which would justify the amount of 214*l.* if the head of damage for the year 1914-15 were alone admitted. But even if he did in the sum of 214*l.* include an item for loss from injury to the herbage for 1913-14, I am not satisfied by the defendants' argument that, because the majority of the resident freemen and resident widows of freemen did for that year transfer their stint tickets to other resident inhabitants for valuable consideration, the learned judge erred in so doing. I agree with Neville J. that the plaintiffs are the statutory representatives of the resident freemen and resident widows of freemen for all purposes relating to the pasturage of the Town Moor, and that it is their duty to protect and improve the moor, and that they are legally entitled to recover damages for injury done to that pasturage, and that the measure of damages is the amount of injury done. The case is no doubt a peculiar case; no authority bearing upon the particular question as to damages in respect of the year 1913-14 has been cited to us, and I know of none that could be. But it seems to me to be impossible to hold that, because some—whether the majority or the minority—of the resident freemen (I use that term for the sake of brevity) have exercised a statutory right to transfer their individual rights of pasture during a given year,

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either the right of the plaintiffs as representatives of the whole body of freemen to sue is impaired, or the quantum of damages recoverable from a wrong-doer ought to be reduced below the full amount commensurate with the damage which he has done to the pasturage in which the whole body has an interest. It is quite possible that, when the damages have been recovered, the fact that in regard to the year 1913-14 a number of those whom the plaintiffs represent had transferred their stint tickets to others than resident freemen may raise for the consideration of the plaintiffs questions as to the proper application of the fund which those damages have created. But these appear to me to be, if I may use the phrase, matters of domestic administration; not matters which ought to be held to impair or lessen the liability of the defendants to pay such a sum of damages in respect of 1913-14 as will give proper compensation for the damage done to the "herbage right" belonging to the body of which the plaintiffs are the statutory representatives. For the reasons which I have given I think that the appeal of the defendants in respect of damages, as well as in other respects, fails and ought to be dismissed.

I desire, however, upon one matter to which I have already incidentally made a reference, to say a few words before concluding this judgment. I said that with one exception the contentions as to damages put before us consisted of contentions with which Neville J. has dealt in his judgment. That exception is the argument put forward by the respondents' counsel in this Court for not interfering with the amount awarded for damages in the Court below, even if we thought that objection might rightly be taken to the reasoning upon which Neville J. based his figure of 214*l*. It was contended that, in that event, the judgment might, nevertheless, be supported on the ground that the Court might, in arriving at a figure, take into consideration the much larger amount—1050*l*.—which the defendants were willing to pay the corporation for the use of the ground. The point was not pressed, though it was referred to, in the speech of the respondents' counsel in reply in the Court below. It is not mentioned in Neville J.'s judgment and it does not appear in the statement of the arguments of the plaintiffs' counsel in the report of the

case in the *Law Reports*. But it was put before us in the course of the hearing in this Court, and reliance was placed upon the judgments in *Whitwham v. Westminster Brymbo Coal and Coke Co.* (1) It is in these circumstances right that I should say that the principle, analogous to that previously acted upon in colliery way-leave cases, which was adopted by Chitty J. and approved by the Court of Appeal upon peculiar facts in that case, has, in my opinion, no application in such a case as the present. The plaintiff there sued in respect of a long-continued trespass to his land; the land occupied by the defendants in the present case is the land not of the plaintiffs but of the Corporation of Newcastle, and I see no reason, in regard to the damages payable to the plaintiffs in regard to consequent injury to the herbage, to depart, in assessing damages for such a tort, from the general and well-recognized rule that the measure of damages is the loss that the plaintiff has sustained, and any benefit which accrues to the defendant is not an element to be taken into consideration.

I am of opinion that this appeal should be dismissed.

SWINFEN EADY L.J. The first question raised by the appeal is whether the Corporation of Newcastle had power to enter into the agreement of June 4, 1913, without the consent and indeed against the will of the plaintiffs, who represent the resident freemen and resident widows of freemen of the town of Newcastle-upon-Tyne. The agreement has reference to a portion of the Town Moor, and under two Acts of Parliament of 1774 and 1870 the full right and benefit to the herbage of the moor was confirmed and established to the said freemen and widows.

By the agreement in question, the Corporation of Newcastle agreed with the defendants, who carry on business under the style of "The North Eastern Roundabout Syndicate," and were in the agreement called "the lessees," to permit the lessees to have the exclusive use of certain parts of the Town Moor to be staked out by the city engineer, and to be used for the purpose of erecting thereon shows, caravans, exhibitions, booths, and similar erections on the 24th, 25th, and 26th days of June, 1913, with further liberty to enter for the purpose of erecting the

(1) [1896] 2 Ch. 538.

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permitted erections on June 22 and 23. The lessees paid to the corporation for this licence or privilege 1050*l*. The lessees agreed to do as little damage as possible to the herbage and soil of the Town Moor, and that they would at their own expense make good any damage to the satisfaction of the city engineer. The corporation are not parties to the action, but the only title of the defendants is under the agreement with the corporation, and the latter have passed a resolution instructing the town clerk to defend the action.

The soil of the Town Moor being vested in the corporation, and the herbage in the plaintiffs, the corporation seek to justify their agreement under s. 7 of the Act of 1774 and ss. 8 and 19 of the Act of 1870.

Sect. 7 of the Act of 1774 (which Act authorizes certain demises) provides that no demise shall be made by virtue of the Act of any part of Cowhill, and the portion of the Town Moor adjoining the same, as shall be necessary for holding the fairs commonly called the Cowhill Fairs, nor of another parcel of the Town Moor called the race ground, but the same should be preserved for fairs and horse races as theretofore. It appears that there are two ancient fairs called Cowhill Fairs, each lasting for one day only, one held at Lammas and the other in October, under charters granted by King John and King Henry VII. respectively. The occasions in June mentioned in the agreement were not race days or fair days. Nor can it be successfully maintained that granting permission to private persons to erect roundabouts and shows on the moor for their private profit on the occasion of a temperance festival is a "public purpose" within the meaning of s. 8 of the Act of 1870. Moreover, under s. 8, the corporation cannot enter into an agreement, for the purpose of that section, without the concurrence of the committee of stewards, which was not obtained.

Under these circumstances, I am of opinion that the defendants have failed to establish any power in the corporation to grant the permission conferred by the agreement of June 4, 1913, and the injunction was properly granted.

There remains the question of damages.

Neville J. assessed the damage sustained by the plaintiffs at

214*l*. It is established by the evidence that serious damage to the herbage of the moor was done by the defendants. Heavy traction engines hauling weighty loads seriously cut up the turf, both bringing the shows and enormous roundabouts on to the ground, and afterwards removing them, and the traffic cut up the surface of the moor badly. A temperance festival had indeed been held on the moor annually in June for some years, but the season in June, 1912, was very wet indeed, and the surface of the moor had been much cut up and injured by the heavy traffic, and it was for this reason that the plaintiffs had determined that there should not be any festival on the moor in 1913, in order to give the herbage a rest. The damage done in 1913 consisted in part of destroying the benefit of expenditure incurred to remedy the damage of 1912; this expenditure included digging, levelling, filling up holes, sowing grass seed, and rolling. In portions, the recovery of the turf was thrown back for two years. Considerable further expenditure will now be necessary to restore the surface, and then in time the grass will recover.

It was urged that the plaintiffs even if entitled to an injunction could not recover damages, as they were not the persons who had really suffered the injury. Under the Act of 1870, the number of cows to be depastured upon the moor in any one year is restricted to 800, for which "stint tickets" are to be issued, and the right to these tickets is to be determined by ballot, and freemen obtaining "stint tickets" may transfer their tickets to any resident inhabitant of the borough for such consideration as they may think fit, so that no one person hold more than ten tickets. The argument was that the "stint ticket holders" were the persons really injured by cutting up the moor. In my opinion, according to the true construction of s. 6 of the Act of 1870, the committee of stewards and wardens, who are authorized and required to act for and on behalf of the stewards and wardens and freemen, and widows of freemen, for all purposes relating to the Town Moor, are the proper persons to sue and recover damages for all injury done to the moor. They are to act for all purposes relating to the Town Moor, and one obvious purpose is to sue for injuries caused by trespassers. The damages awarded are for the physical injury to the moor,

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including prospective damage which the freemen will suffer by loss of herbage during 1914-15. I am not satisfied that in assessing damages Neville J. took into consideration the loss suffered by the "stint ticket holders" for 1913-14; he mentions expressly having taken into account the damage to all the freemen for 1914-15, and says that such damage would not be covered by the argument about the "stint ticket holders," which seems to imply that he acceded to the view that the plaintiffs could not recover in respect of such damage, as he does not otherwise deal with this point. In any case, however, the plaintiffs are, in my opinion, entitled to retain their judgment for the 214*l.* recovered, even if the sum includes any damage suffered by these ticket holders. The plaintiffs are by statute authorized and required to act for all purposes relating to the Town Moor, and may recover damages in respect of all injury to the moor. Any sums recovered will be held by them in trust; they take no beneficial interest. The restoration of the moor as far as possible to its former condition will certainly be one of the purposes to which the moneys recovered by them in this action are dedicated. It may also be that some portion should be paid to freemen or to "stint ticket holders." With the ultimate distribution of the fund, however, the defendants have no concern. The plaintiffs being in a fiduciary position will be entitled, out of the sum recovered, to retain the difference between their party and party and solicitor and client costs of this action, so that the question what proportion of the balance, if any, of the 214*l.* the "stint ticket holders" will be entitled to will probably never actually arise. If it did arise the plaintiffs could apply to the Court for directions.

In my opinion the appeal fails and should be dismissed.

Solicitors: *Collyer-Bristow, Curtis, Booth, Birks & Langley,*
for *A. M. Oliver, Newcastle-upon-Tyne*; *J. H. Pitchforth, for*
Arnott, Swan & Walker, Newcastle-upon-Tyne.

H. C. R.

In re BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY. NEVILLE J.

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Nov. 3, 4.

[00213 of 1911.]

Building Society—Winding-up—Official Receiver—Creditors—Dividends overpaid—Payment by Mistake of Law—Refunding Amount overpaid.

In the winding up of a building society the Court of Appeal affirmed the decision of Neville J. that the A and B shareholders of the society were entitled to be paid in full out of the assets of the society in priority to a third class of creditors called depositors. The assets being amply sufficient for that purpose, the liquidator, who was the official receiver, thereupon paid the claims of the B shareholders in full before he received notice of an appeal by the depositors to the House of Lords. That House varied the judgment of the Court of Appeal by directing that the depositors were entitled to share rateably with the A and B shareholders in the assets, and this decision gave an all-round dividend of 16s. in the pound.

On the application of the liquidator the B shareholders were ordered to refund 4s. in the pound, being the amount they had received in excess of 16s. in the pound.

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This was an application by the liquidator to obtain repayment from certain B shareholders of the society of the amount paid them in excess of the dividend to which they were entitled under these circumstances.

In June, 1911, the society went into liquidation, and the official receiver became the liquidator. The society had for many years, in addition to the ordinary business of a building society, carried on an extensive banking business, and had a very large number of customers on deposit banking accounts (hereafter referred to as the depositors). In the winding-up questions arose between the A and B shareholders of the society and the depositors as to their respective rights and priorities in the distribution of the assets of the society, and in November, 1911, Neville J. held that the banking business was ultra vires the society and that the claims of the depositors must be postponed until the A and B shareholders had been paid in full, and his decision was affirmed by the Court of Appeal. (1)

In the meantime the A shareholders and the depositors entered

(1) [1912] 2 Ch. 183.

NEVILLE J. into a scheme of arrangement which was sanctioned by the Court of Appeal. The B shareholders were not parties to the scheme, but it provided (clause 7) that a sufficient sum should be set aside out of the assets to cover their claims. The assets of the society were amply sufficient to pay the claims of the A and B shareholders in full, and the liquidator, after the judgment of the Court of Appeal, paid the claims of the B shareholders in full, i.e., 20s. in the pound, with interest.

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Subsequently the House of Lords, on an appeal by the depositors, varied the judgment of the Court of Appeal by a declaration to the effect that the depositors were entitled to rank *pari passu* with the A and B shareholders in the distribution of the assets of the society: see *Sinclair v. Brougham*.⁽¹⁾ The result of this decision was to make an all-round distribution of 16s. in the pound, and the liquidator accordingly applied to the B shareholders to refund to him 4s. in the pound, being the difference between the 16s. and 20s. in the pound of the amount they had respectively received. A Mr. Laskey and a Mrs. Rubie (amongst others) declined to do so, and the liquidator now applied for a declaration that all holders of B shares in the society who had been paid in respect of their holding of B shares in the society sums in excess of the amounts to which, pursuant to the judgment of the House of Lords dated February 12, 1914, they were entitled in the liquidation of the society were liable to repay to the liquidator the amount of such excess respectively; and for an order on Mr. Laskey and Mrs. Rubie to repay respectively the sums of 41*l.* 13*s.* 3*d.* and 104*l.* 3*s.*, being the amounts paid to them respectively in respect of their holdings of B shares in the society in excess of the aggregate amounts to which they were entitled respectively pursuant to the said judgment.

It appeared that the liquidator had paid the claims of the B shareholders in full before he had notice of the appeal by the depositors to the House of Lords; and that Mr. Laskey and Mrs. Rubie had respectively received such payment in the capacity of legal personal representatives of deceased B shareholders and had respectively accounted for or spent it in due course of administration.

(1) [1914] A. C. 398.

C. W. Turner, for the liquidator.

W. Draper, for Laskey. In the first place, the judgment of the House of Lords was not intended to interfere with any distribution of the assets that had already been made: *Sinclair v. Brougham*. (1) Secondly, the B shareholders were not parties to the appeal in the Court of Appeal, and there was no stay of execution under that judgment. The payment made to them by the liquidator after that judgment was a voluntary payment, and it was a payment made under a mistake of law, and therefore cannot be recovered: *Moore v. Fulham Vestry*. (2)

J. F. Galbraith, for Mrs. Rubie, adopted the same line of argument, and on the second point cited *In re Horne* (3) and *In re Robinson*. (4) The liquidator is himself the person who is responsible for the mistake that has been made.

NEVILLE J. The real point to be decided in this case is whether, the official receiver, who is the liquidator, having overpaid certain B shareholders entitled to share in the distribution of the assets of the society, the Court is entitled to order the amount overpaid to be refunded to the liquidator. In my opinion the Court has that right, and ought under the circumstances to make an order that the money, which has been overpaid by an official of the Court, should be refunded. I think it was a mistake of the Court. I think the amount at present to be returned by the B shareholders should be the sums they have received in excess of the dividend of 16s. in the pound paid to the A shareholders and to the depositors, that is 4s. in the pound. But the order I now make will be without prejudice to their strict right to share in any subsequent adjustment of the assets.

Solicitors for the liquidator: *Freshfields*.

Solicitors for respondents: *Foord & Son; Rubinstein, Nash & Co.*

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(1) [1914] A. C. 398, 424.

(2) [1895] 1 Q. B. 399.

(3) [1905] 1 Ch. 76.

(4) [1911] 1 Ch. 502, 513.

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1914

June 30.

In re WILBERFORCE'S TRUSTS.
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[1914 W. 1243.]

*Vendor and Purchaser—Sale of Incumbered Land free from Incumbrances—
Discharge of Land by Payment into Court—Conveyancing and Law of
Property Act, 1881 (44 & 45 Vict. c. 41), s. 5.*

Where land subject to a capital charge, such as a term to secure portions, is sold free from incumbrances and without the assent of the incumbrancers, and an application is made to the Court, under s. 5 of the Conveyancing Act, 1881, for an order for payment into Court of an amount sufficient to meet the incumbrances and interest thereon and the additional amount to meet the contingencies referred to in the section, the amount to be paid in to meet the incumbrance is not necessarily merely the bare amount of the capital charge, but the Court may direct payment into Court of such amount as, when invested in Government securities, it considers will be sufficient to meet the capital charge and interest thereon.

The object of the section is not to disturb any rights more than is necessary, but to enable a sale to be carried through notwithstanding there is an incumbrance which, but for the section, would prevent a sale free from incumbrances. Although the purchaser gets the property unincumbered, the money paid into Court is not substituted, as between the incumbrancer and the vendor, for the incumbered land as the sole security for the incumbrancer's money. The incumbrancer has an additional security on the purchase-money received by the vendor, who, in case of a depreciation in value of the Government securities in which the money is invested, is bound to make good the depreciation to the incumbrancer, whereas any appreciation in value belongs to the vendor.

Important matters under the section should not be decided by a Master but referred to the judge.

By an indenture dated July 15, 1867, and made between the Right Reverend Samuel Wilberforce, Bishop of Oxford, of the first part, Reginald Garton Wilberforce (his eldest son) of the second part, Anna Maria Denman of the third part, Richard Denman the younger and F. J. Anderson of the fourth part, and the Honourable Percy S. Wyndham and Sir C. H. J. Anderson, Bart., of the fifth part (being a settlement on the marriage of R. G. Wilberforce and Miss Denman, which took place the following day), certain hereditaments called the Lavington estate were (subject to the bishop's life interest, a mortgage, and

some term of years previously created) limited to R. Denman SARGANT J. the younger and F. J. Anderson to the use and intent that if Mrs. R. G. Wilberforce should survive her husband, she and her assigns might thenceforth receive during her life a jointure rent-charge of 300*l.* a year, and subject thereto to the use of the same trustees, their executors, administrators, and assigns, for the term of 1200 years from the date of the marriage, to secure the jointure rent-charge, and portions (not exceeding 10,000*l.* in all) for the younger children of the marriage, such sum of 10,000*l.* to be paid to all such one or more, exclusively of the other or others, of such children at such ages and in such manner (as therein mentioned) as Mr. and Mrs. R. G. Wilberforce should by deed or as the survivor of them should by will appoint. The Lavington estate was then settled in strict settlement.

There were eight children of the marriage. The bishop (then Bishop of Winchester) died on July 19, 1873.

In 1889, when R. W. Wilberforce, the eldest son of the marriage, attained the age of twenty-one, a disentailing assurance and a resettlement were executed, under which the Lavington estate was limited to further uses in strict settlement, subject (in default of a joint appointment by R. G. Wilberforce and R. W. Wilberforce) to the life estate of R. G. Wilberforce, and subject also to the jointure rent-charge and to the term of 1200 years and the trusts thereof.

Doubts having arisen as to whether the estates in tail male or in tail in remainder of R. W. Wilberforce had been effectually barred by the disentailing assurance of 1889, another disentailing assurance was executed in 1891, and on the same day there was a confirmatory resettlement of the Lavington estate in strict settlement, but subject as mentioned in the resettlement of 1889.

In 1892 portions of the estate were sold, the purchase-moneys being paid to the trustees of the term and invested in railway companies' preference stocks.

The joint power of appointment in respect of the 10,000*l.* portions was exercised by three deeds executed in 1894, 1910, and 1913.

In 1903 R. G. Wilberforce and R. W. Wilberforce agreed

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SARGANT J. to sell the Lavington estate free from incumbrances, but on investigating the title the purchaser took objection on account of the charge for the portions of 10,000*l.*, which were not yet raisable, and eventually it was agreed that the vendors should apply to the Court under s. 5 of the Conveyancing Act, 1881, for leave to pay money into Court to meet the 10,000*l.* and such additional sum, not exceeding 1000*l.*, as the Court should direct.

On this application a Master in chambers on August 7, 1903, made the following order: "It is ordered that the applicants . . . be at liberty to lodge in Court, as directed in the lodgment schedule hereto, the sum of 10,000*l.* (including the net proceeds of certain investments now standing in the names of the trustees of the term)"—being the above-mentioned preference stocks—"to secure such portion money in the originating summons mentioned, and also the sum of 1000*l.*, the said sum of 10,000*l.* being a sum sufficient to provide for such portion money and to meet the incumbrance created to secure the same, and the said additional sum of 1000*l.* being for the purpose of meeting the contingency of further costs and expenses and interest and any other contingency except depreciation of investments in respect of such portion money and incumbrances. And the judge doth declare that, upon such respective lodgments being made, the said estate, and all other property (if any) subject to such portion money and comprised in the term of 1200 years created to secure the same be freed from such portion money and interest. And it is ordered that, upon such lodgment being made, the said term do vest in the applicants . . . or, in the event of the said contract having been completed by conveyance and payment of the purchase-money, in " the purchaser.

Soon afterwards the sum of 11,000*l.* was paid into Court and invested in 12,537*l.* 16*s.* 1*d.* New Consols.

After the sale the net purchase-moneys received were, by a deed dated December 11, 1903, declared to be held by trustees upon the same trusts, and for the same purposes, and subject to the same powers and provisions in all respects, as near as might be, as the same would be held in case the same arose from or consisted of capital money arising under the Settled Land Acts,

1882 to 1890, provided always that the same should be subject to SARGANT J. and charged with the said jointure rent-charge, and it was agreed and declared that the trustees should be entitled to receive and to hold and apply any balance of the 11,000*l.* paid into Court, after the death of R. G. Wilberforce and after meeting or providing for the portions raisable under the settlement of 1867, upon the same trusts, for the same purposes, and subject to the same provisions and powers in all respects, as near as might be, as were thereinbefore declared of or concerning the said purchase-moneys.

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R. G. Wilberforce died on January 19, 1914, and, the portions having become payable, A. M. Wilberforce (his widow) and one of the daughters presented a petition for sale of the New Consols, and payment out of the proceeds and distribution thereof.

When the petition came on for hearing it was shown that the money in Court, owing to a depreciation in Consols, no longer represented the amount paid into Court, and Sargant J. ordered the petition to stand over and directed an originating summons to be issued raising the question whether, upon payment into Court, under the Conveyancing Act, 1881, of 11,000*l.*, the charge for portion moneys arising under the trusts of the term of 1200 years became extinguished as against the purchase-money received by or on behalf of the vendors.

The summons was taken out by persons claiming to be interested in the portion moneys.

C. Gurdon, for the plaintiffs. The money was paid into Court under the part of s. 5, sub-s. 1, of the Conveyancing Act, 1881, which commences "and in any other case of capital money charged on the land." (1) On payment in being made the Court can, under sub-s. 2, declare the land to be freed from the incumbrance, order a conveyance or make a vesting order proper to effectuate the sale, and give directions for the retention and investment of the money. The Master had no jurisdiction to make the order; he ought to have referred it to the judge. But assuming the order to be right, the payment in, although it frees the land from the portions and the term, does not substitute

(1) The whole section is set out in his Lordship's judgment.

SARGANT J. the money for the land. If the money turns out to be insufficient to pay the portions in full, the deficiency must be made good by the vendors. The section was passed to enable vendors to sell free from incumbrances in cases where they could not previously have so sold; and it should be so construed as to do as little harm to the incumbrancers as possible.

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Percy Wheeler, for an appointee of part of the 10,000*l.* In construing the section one has first to consider what the law was before it was passed. In a creditors' suit to administer realty subject to a mortgage having priority over the creditors, a sale free from the mortgage could not be ordered without the mortgagee's consent: *Wickenden v. Rayson*. (1) And where a legacy was charged on the land and made payable in future and there was nothing to show that the testator intended the property to be sold free of the legacy before the time of payment arrived, a sale in the meantime could only be made subject to the legacy: *Dickinson v. Dickinson*. (2) The same rule applied in the case of portions to children: *Wynter v. Bold* (3); *Sheppard v. Wilson*. (4) If a fund is set aside by the Court to answer annuities and legacies charged on the property, the rest of the property is not released, but it may be followed, in the absence of an order under s. 5, into the hands of those who take it: *In re Evans and Bettell's Contract*. (5)

C. Lyttelton Chubb, for R. W. Wilberforce. The charge is gone altogether. The land is freed from the portions and the money in Court is the substituted security.

[SARGANT J. In the present case there is a deficiency, but what happens where there is a surplus after paying off the incumbrancer?]

It belongs to him. The vendor is under no liability after the money has been paid in. It would not be right to hold that the incumbrancer had a double security—one on the money in Court and the other on the liability of the vendor. [He referred to *In re Great Northern Ry. Co. and Sanderson* (6); *In re Freme's Contract*. (7)]

(1) (1855) 6 D. M. & G. 210.

(2) (1789) 3 Bro. C. C. 19.

(3) (1823) 1 S. & S. 507.

(4) (1845) 4 Hare, 392.

(5) [1910] 2 Ch. 438.

(6) (1884) 25 Ch. D. 788.

(7) [1895] 2 Ch. 256

[SARGANT J. If there were a surplus it seems clear that SARGANT J. the vendor would be entitled to it.]

Percy Vaughan, for parties in the same interest. Before the Act of 1881 you could not, as a rule, in the absence of an express power, raise portions before they were payable so as to shift the security from the land, although, where under a settlement a sum was to be raised out of realty for younger children's portions, and some of them had become payable, the Court would raise the whole sum at once, although some of the children had not acquired vested interests therein: *Gillibrand v. Goold*. (1) There Shadwell V.-C. said the Court considered the investment as equivalent to payment, and that if there was any rise in the funds the children under age would have the benefit of it. The effect of the Act is much the same, and the fund in Court is substituted for the land. [He also referred to Hood and Challis on the Conveyancing, Settled Land and Trustee Acts, 7th ed. p. 28.]

E. R. Simpson and Meyrick Beebee, for other parties.

C. Gardon in reply.

SARGANT J. This is a summons, taken out by my direction, with regard to a petition which has been presented for the payment out of Court of certain moneys paid into Court under s. 5 of the Conveyancing Act, 1881, and it raises a very difficult and important question as to the effect of payment into Court under that section.

The question arises under various settlements, which I can refer to quite briefly. In the year 1867, the then Bishop of Oxford, the Right Reverend Samuel Wilberforce, made a settlement of a considerable estate in Sussex called the Lavington estate. Under that settlement a term of 1200 years was created for the purpose of securing a jointure rent-charge for the bishop's eldest son's widow, and portions for that son's younger children, amounting in all to 10,000*l*. In 1889 the estate was disentailed and resettled. In March, 1891, there was a confirmatory resettlement, but each resettlement took place and had effect subject to the overriding charge for portions. It is sufficient for

(1) (1833) 5 Sim. 149.

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SARGANT J. me to say that the uses declared by the resettlement were ordinary uses in strict settlement. In 1892 sales were made of portions of the estate, and the purchase-money on those sales was paid to the trustees of the term of 1200 years. That money was invested by them in the preference stocks of three railway companies, the nominal amount of the investments being about 5800*l.*, but their actual capital value being probably at least 7000*l.* at that time. In 1903 the persons interested under the resettlement determined to sell the rest of the property, as they were entitled to do under certain powers in the resettlement, but they found themselves met with this difficulty, that there was the overriding charge for portions, under the settlement of 1867, which resulted in there being a capital sum of 10,000*l.* raisable on the death of the tenant for life under the original settlement. The portions were not at that time raisable, and would not be raisable until the determination of a life in being. Under those circumstances the vendors applied under s. 5 of the Conveyancing Act, 1881, for, and obtained, an order for payment of a sum into Court. The order, on the face of it, purports to have been made by a judge, but I am told that it was made merely by a Master, and I must say that, having regard to the amount in question and the rather difficult language of the section in question, it was, in my opinion, a matter in which an order ought not to have been made by a Master, but one which he ought to have referred to the judge. [His Lordship read the order and continued:] The money paid into Court was invested in Consols to the amount of 12,537*l.* 16*s.* 1*d.*, which at 75 per cent. are worth about 9402*l.*; and various appointments were made of the fund in Court under powers given by the original settlement.

When the petition for payment out came before me questions arose as to the order of priority in which those appointees were to be paid (the fund in Court being clearly insufficient to meet the portion sum of 10,000*l.*) and as to which of the persons entitled to the appointed fund had to bear the deficiency in that fund. It then seemed to me to be by no means plain that the fund in Court was the only fund applicable to meet the portions, and, as immediately after the sale in 1903 the proceeds

of that sale had been resettled and were still in the hands of the persons originally entitled to the land or their successors in title, I thought it advisable that a summons should be taken out for the purpose of ascertaining whether the effect of the order was merely to clear the land in the hands of the purchaser from the charge for portions, or whether the effect was that the amount paid into Court was the sole and only security for the portions of 10,000*l*. That question has now been very fully argued before me, and it is on that question that I have to give my decision.

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The Conveyancing Act, 1881, is divided into eighteen parts, and Part II. has the compendious title of "Sales and other Transactions," and the object of the sections comprised in Part II. is obviously to facilitate sales of land. Sect. 5 of the Act, which is one of the provisions included in Part II., has a sub-heading, all to itself,—not a mere marginal note—of "Discharge of Incumbrances on Sale," and sub-s. 1 of s. 5 says that "Where land subject to any incumbrance, whether immediately payable or not, is sold by the Court, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in Government securities, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge,"—that is one of the two alternatives, and then comes the second alternative—"and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reason thinks fit to require a larger additional amount." Then by sub-s. 2 of s. 5 the consequence of that payment into Court is declared as follows: "Thereupon, the Court may, if it thinks fit, and either after or without any

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SARGANT J. notice to the incumbrancer, as the Court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court." Sub-s. 3 of s. 5 is as follows: "After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof."

Prima facie, the object of the whole of s. 5 is not to disturb any vested or other rights more than is necessary, but to enable a sale to be effected and the property to be transferred to the purchaser notwithstanding there may be on the land a liability for payment of a future sum which would, but for the provisions of the section, clearly have prevented the sale of the land free from incumbrance. Of course, a purchaser might think fit to take the land subject to the incumbrance, but the purchase of land subject to an incumbrance is not usually a desirable investment, and the object of the section was to enable the land to be conveyed to the purchaser so that he might get a full and complete title to it.

Sub-s. 1 of s. 5 obviously deals with two alternatives. One is the case of a sale of land which is subject to an annual charge or what I may call a determinable charge, that is to say, a charge which, though resulting in the payment of a capital sum, is charged on a determinable interest only. In the case of that alternative it is clear that the amount which is to be paid into Court and invested is such an amount as, when invested in Government securities, the Court considers will be sufficient to keep down or provide for the charge; and the Court has there to exercise a discretion and see how much has to be paid into Court.

Then comes the other alternative, "in any other case of capital money charged on the land," when the payment into Court is to be "of the amount sufficient to meet the incumbrance and any interest due thereon." Does that merely mean the actual amount of the capital money, or does it mean the amount

which is considered by the Court sufficient, when invested in Government securities, to meet the incumbrance and any interest thereon; that is to say, are the words in the first alternative reflected into the second alternative, so that by the words "the amount" I am to understand the Legislature as meaning the sufficient amount as set out in the earlier part of sub-s. 1, or am I to take "the amount" as meaning merely the bare amount of the capital charge? In my opinion, the former is the truer construction. It seems to me that there is no reason why in the second part of the sub-section the Court should not have the same discretion that it has in the first part of the sub-section or be limited to directing payment into Court of the bare amount of the charge itself. I do not say that necessarily the amount that the Court may order to be paid in is an amount which is to be sufficient to cover the depreciation of investments. It may be that the amount to be paid in for depreciation is conclusively fixed as being, together with what is paid in to meet further costs, expenses, and interest, a sum not exceeding 10 per cent. That may be so, the language is obscure; but, nevertheless, it seems to me that the amount which is to be paid into Court is the amount which, in the opinion of the Court, is sufficient, when invested in Government securities, to meet the incumbrance and any interest thereon.

That being so, the result would follow that in most cases there would be a margin, the amount paid in not being, as was unfortunately the case in this particular transaction, merely the bare amount of the charge plus the 10 per cent. At any rate, when the 10 per cent. was added to it, it is quite clear that the amount would in general be an amount with a margin, even after allowing for the costs and expenses.

Then is there any reason why I should interfere with the existing rights of the portioners in this case, or the rights of persons entitled to any other capital charge in the general case contemplated by the section, by saying that, whereas prior to the section coming into operation they had as security for the payment of their charge the full and entire value of the land, yet after the section came into operation they should have, as the sole security for the payment of their capital

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SARGANT J. charge, the amount paid into Court? The arguments of Mr. Lyttelton Chubb and Mr. Vaughan really came to this, that the amount paid into Court was actually substituted for the charge, not that it was a mere security for the charge. They seem to me to be driven to put forward that contention. But let me take a case of this kind: Whiteacre and Blackacre together subject to a capital charge for 1000l.; Whiteacre sold for 2000l.; 1100l. of that paid into Court; and Whiteacre declared to be freed from the charge. It seems to me that there is nothing in the section in any way to relieve Blackacre from the charge. The only property that is freed is Whiteacre, and therefore, in that event at any rate, the chargees would not be limited to the sum of 1100l. paid into Court; they would be in the position of retaining their security on Blackacre. So that it seems to me to be quite clear that the effect of the section is not in such a case as that to limit the charge to the amount paid into Court, still less to substitute the money paid into Court for the charge.

Again, take the case where, through appreciation of investments and so on, the amount paid into Court turns out ultimately to be in excess of the amount required for payment of the capital charge. In such a case one can hardly doubt that the persons originally entitled to the land, who paid in the money, would be held entitled to have paid out to them any surplus left after satisfying the charge. If that is so, and if in those cases the money paid in is only to be treated as a security, why should I, in a case where the money value of what has been paid in ultimately turns out to be less than the amount of the charge, treat the money as not being by way of security, but as being in substitution, and so deprive the chargee of the benefit of the further security which he would have had but for the operation of the section, namely, the rest of the value of the land? It is quite true, as Mr. Vaughan urged,—and here is where I have the main difficulty—that the section does not in terms say that, while the land sold is freed from the charge, that which is substituted for the land, namely, the purchase-money, shall be put into the same category in that respect as the land; but neither does the section say that the sum paid in shall from that time forward be the sole

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security for or represent the charge. On either construction I have to supply something to a section which is bald and not in itself complete. In my judgment, it is doing less violence to the rights of persons to decide that the substitution of money for land—which has been effected for the purpose of enabling land to be transferred to a purchaser freed from incumbrances—should have as small an operation, as regards other interested persons, as possible. No doubt, by the mere substitution of money for land, the chargee is to some extent prejudicially affected, because it is more difficult to trace money than to trace land; but in a case where, as in this case, the purchase-money for the land remains and can be traced, I see no reason why I should relieve the vendors of the land and their successors in title from the obligation which they as owning the land were under to pay the full sum of 10,000*l.* when the portions became payable, and cast the loss which has occurred in the interval, through the depreciation of investments, upon the chargees, who had nothing whatever to do with a sale, which was the result of a purely voluntary act on the part of the vendors.

In my opinion, the most equitable and proper construction to put upon this section is one which prevents it operating to a greater extent than is necessary to enable a good title to be given to the purchaser, and which leaves the whole of the proceeds of sale representing the land—so far as they can be traced—subject in case of need to the like burdens to which the land itself would have been subject if it had not been sold.

Accordingly, I hold that on the payment into Court of the sum of 11,000*l.* the charge for portion moneys arising under the trusts of the term of 1200 years did not become extinguished as against the purchase-money received by or on behalf of the vendors, and that any deficiency of the amount in Court to satisfy the portion sum of 10,000*l.* ought to be made up out of the moneys which were resettled after the sale was effected.

Solicitors for the plaintiffs and for some of the defendants:
Ullithorne, Currey & Co.

Solicitors for the other defendants: *Greenfield & Cracknall*;
Bircham & Co.

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Local Government—District Council—Public Right of Way—Obstructions—Removal by Private Individuals—Action by Landowners—Resolution of District Council to defend Action—District Council made Defendants—Defence conducted by District Council on behalf of Co-defendants, without themselves claiming or denying Public Right of Way—Failure of Defence—Liability of District Council to Costs—Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 26.

An action was brought by certain landowners against private individuals for removing obstructions to an alleged public right of way. The district council having passed and acted on a resolution to defend the action under the Local Government Act, 1894, s. 26, were themselves made defendants, and a declaration that there was no public right of way was asked against them. On an application by the district council to be struck out as defendants, the plaintiffs were allowed to amend by alleging that the district council threatened and intended to use the alleged public right of way by their servants or agents. The district council then put in a defence stating that they neither claimed nor denied that the public right of way claimed by their co-defendants in fact existed, and they denied any threat or intention to use it by their servants or agents, but, though really innocent of any such threat or intention, they in fact conducted the whole defence on the main issue, namely, the existence of the public right of way, up to the trial, and failed to establish it:—

Held, that the plaintiffs were entitled to a declaration with costs against all the defendants, including the district council.

Thornhill v. Weeks (No. 2) [1913] 2 Ch. 464, 468, followed.

Rex v. Norfolk County Council [1901] 2 K. B. 268 and *Offin v. Rochford Rural Council* [1906] 1 Ch. 342 distinguished.

WITNESS ACTION.

On June 28, 1912, the plaintiff Thornhill, the owner of the Drayton estate, Hampshire, issued a writ against the defendants Weeks, French, and White (hereinafter called the original defendants) claiming an injunction to restrain them from trespassing on and injuring his property.

The original defendants, who were persons in a humble position of life, relied on an alleged public right of way.

The original statement of claim was delivered on October 12, 1912, and alleged various acts of trespass and damage by the original defendants in the assertion of their alleged public right

of way, which right of way was denied by the plaintiff **ASTBURY J. Thornhill**.

On October 25, 1912, the statement of claim was submitted to the Andover Rural District Council, who had been asked by the local parish councils to take steps to defend the action, and it was resolved that the Andover Council should defend the action, and their clerk was directed to take all necessary steps for the defence.

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This resolution was passed and acted on in performance of the Andover Council's statutory duties as protectors of public rights of way under the Local Government Act, 1894, s. 26. (1)

On November 12, 1912, the defence of the original defendants was delivered by the Andover Council's solicitors, alleging the public right of way, and admitting that the original defendants had abated certain obstructions in assertion of that right.

On January 30, 1913, the plaintiff Thornhill obtained leave to add Judd, a tenant of a portion of the property, as co-plaintiff, and to amend accordingly, and on February 5, 1913, he obtained leave to add the Andover Council as defendants and to amend accordingly.

On February 7, 1913, particulars were delivered on behalf of the original defendants purporting to show the line of way claimed. The plan annexed to these particulars was in fact inaccurate in the delineation of the actual way claimed at the trial.

(1) The Local Government Act, 1894, provides as follows:—

Sect. 26, sub-s. 1: "It shall be the duty of every district council to protect all public rights of way, and to prevent as far as possible the stopping or obstruction of any such right of way, . . . where the stopping or obstruction thereof would in their opinion be prejudicial to the interests of their district . . ."

Sub-s. 3: "A district council may, for the purpose of carrying into effect this section, institute or defend any legal proceedings, and generally take such steps as they deem expedient.

Sub-s. 4: "Where a parish

council have represented to the district council that any public right of way within the district . . . has been unlawfully stopped or obstructed, . . . it shall be the duty of the district council, unless satisfied that the allegations of such representation are incorrect, to take proper proceedings accordingly; . . ."

Sub-s. 5: "Any proceedings or steps taken by a district council or county council in relation to any alleged right of way shall not be deemed to be unauthorised by reason only of such right of way not being found to exist."

ASTBURY J. On February 27, 1913, the plaintiffs delivered their amended statement of claim alleging their title to the property and alleging (paragraph 4) that the defendants respectively wrongfully claimed that there was a public right of way over the property, whereas there was no such public right of way, and alleging (paragraphs 5, 6, 7, 8) the trespass and damage by the original defendants and alleging (paragraph 9) that the Andover Council "in fact justify and approve the acts of the other defendants herein complained of and allege that such defendants are and were entitled to commit the same and also assert that there is a public right of footway over the premises in paragraph 4 hereinbefore mentioned. In accordance with such assertion the council on October 25, 1912, passed a resolution that the council should defend this action and their clerk was directed to take all necessary steps for the defence. All such necessary steps have subsequently been taken pursuant to such resolution."

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As against the original defendants the plaintiffs claimed an injunction and damages and as against the Andover Council they claimed a declaration that there was no public right of way over the property and an injunction to restrain them from asserting that there was such a public right of way.

On April 1, 1913, the Andover Council moved to be struck out as defendants on the ground that the statement of claim disclosed no cause of action against them. Swinfen Eady J. allowed the plaintiffs to amend by alleging that the Andover Council threatened and intended to exercise the alleged public right of way by their servants or agents, and on this amendment he refused the motion. See *Thornhill v. Weeks* (No. 1). (1)

The plaintiffs then amended paragraph 9 of their statement of claim by adding "and the council threaten and intend to exercise by their servants or agents the alleged right of passing along or over the said premises" and extended the words of the proposed injunction accordingly.

On May 3, 1913, the Andover Council delivered their defence to the statement of claim as so amended. They did not admit the plaintiffs' title. They admitted that the original defendants

claimed a public right of way and they alleged that if there was such a public right of way it had been obstructed. ASTBURY J.

By paragraph 4 they stated that "Save as hereinbefore otherwise appears the defendant council do not admit any of the allegations contained in paragraph 4 of the amended statement of claim. The defendant council neither claim nor deny that the public right of footway which is claimed by their co-defendants in fact exists."

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By paragraph 7 they admitted the passing of their resolution to defend the action and that their clerk had taken the necessary steps to carry out the resolution. Save as aforesaid they did not admit any of the allegations of paragraph 9 of the statement of claim and they denied that they threatened or intended to exercise by their servants or agents or otherwise the right of way claimed by their co-defendants.

On June 6, 1913, the plaintiffs moved to strike out this defence as embarrassing, their substantial point being that the Andover Council were really seeking to defend the action without being responsible for costs. Neville J. held that the defence was not embarrassing in point of pleading and refused the motion.

On June 30, 1913, the Court of Appeal affirmed this refusal, with a strong and unanimous intimation of opinion that if the plaintiffs succeeded at the trial they would be entitled to a declaration that there was no public right of way, and the Andover Council would be liable in costs. See *Thornhill v. Weeks* (No. 2). (1)

The evidence at the trial was wholly insufficient to establish any public right of way and the plaintiffs succeeded in their action. The liability of the Andover Council to costs in that event was argued before the judgment on the main case.

P. O. Lawrence, K.C., Hon. Frank Russell, K.C., and Whitmore Richards, for the plaintiffs. Assuming as we contend that the defendants' evidence does not establish a public right of way, we are entitled to a declaration to that effect carrying costs against all the defendants who have asserted the existence of that right of way: *Thornhill v. Weeks* (No. 2). (1)

ASTBURY J. *Macmorran, K.C., Austen-Cartmell, and Harold Danckwerts,*
 1914 for the defendants. The Court of Appeal really left the question
 THORNHILL of the Andover Council's liability to costs to be determined at
 v. the trial.
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 (No. 3). determined.]

The Andover Council were compelled to take some steps to defend this action in performance of their statutory duties under the Local Government Act, 1894, s. 26. They were entitled to do this by giving the original defendants pecuniary assistance towards their costs of defence: *Rex v. Norfolk County Council* (1); and the provision of direct legal assistance obviously falls within the same category.

Even assuming that their resolution to defend the action amounted to an assertion that there was a public right of way, that assertion gave the plaintiffs no cause of action against them, even to the extent of a declaratory judgment: *Offin v. Rockford Rural Council*. (2) The assertion amounted at most to a slander of title, and apart from malice no action would lie. The moment the Andover Council were made defendants they applied to be struck out, and they were only retained by an additional allegation that they threatened and intended to exercise the alleged right of way by their servants or agents: *Thornhill v. Weeks* (No. 1). (3) This additional allegation has not been proved and there is therefore no cause of action against them.

[ASTBURY J. You have done more than merely assert the right. You have fought that very issue up to the trial.]

Only on behalf of our co-defendants, and that we were entitled to do under *Rex v. Norfolk County Council*. (1)

ASTBURY J., after stating the preliminary facts up to the joinder of the Andover Council as defendants and the delivery of the statement of claim against them, continued: Then there were certain interlocutory proceedings. The Andover Council moved to be struck out as defendants on the ground that the

(1) [1901] 2 K. B. 268.

(2) [1906] 1 Ch. 342, 357.

(3) [1913] 1 Ch. 438.

statement of claim disclosed no cause of action against them. See *Thornhill v. Weeks* (No. 1). (1) Swinfen Eady J. allowed the plaintiffs to amend by alleging that the Andover Council asserted a public right of way and threatened and intended to exercise it by their servants or agents, and refused the motion. He said: "It is a proper amendment which will enable the real question to be raised. It is not sought to recover damages against the Andover Council, who have committed no acts of trespass and are in no way responsible for the acts of the original defendants. But in substance there is only one question to be decided, namely, whether, as all the defendants assert, there is a public right of way The present order will not, however, necessarily compel the Andover Council to fight that issue. It will be open to them to consider their position on receiving the amended statement of claim and decide whether they will assert the right of way, or abandon any claim to it."

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To the statement of claim so amended the Andover Council put in a defence in which, while admitting the passing of their resolution to defend the action and that their clerk had taken the necessary steps to carry it into execution, they stated that they neither claimed nor denied that the public right of footway claimed by their co-defendants in fact existed, and they denied any threat or intention to exercise it by their servants or agents.

This defence was framed with the object of obtaining the benefit of the decision in *Rex v. Norfolk County Council*. (2) In that case certain private individuals who had removed obstructions to an alleged public right of way were sued by the landowners, who claimed a declaration that there was no public right of way. The Norfolk County Council acting under the powers of the Local Government Act, 1894, s. 26, passed a resolution to contribute towards the defendants' costs of the pending action. The plaintiffs did not as in the present case seek to make the Norfolk County Council defendants, but obtained a rule nisi for a certiorari to quash the resolution. The Norfolk County Council and the defendants showed cause against the rule, and

(1) [1913] 1 Ch. 438, 444, 445.

(2) [1901] 2 K. B. 268.

ASTBURY J. Lord Alverstone C.J. said "This case is not altogether free from
1914 doubt, but in my opinion we ought not to make this rule
absolute."

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There is a manifest difference between that case and the present. In the *Norfolk Case* (1) the Norfolk County Council were merely contributing to the costs of the actual defendants. They were not themselves defendants and no question of their liability to costs of action could arise.

In the present case the Andover Council passed a resolution to defend the action, and as a matter of fact they took up the whole defence from the time of that resolution, and were themselves made defendants shortly after. On the plaintiffs' application to strike out their defence as embarrassing the Court of Appeal while declining to strike out the defence expressed an opinion which is clearly binding on me, that if the public right of way were not established at the trial the plaintiffs would be entitled to a declaration to that effect with costs against all the defendants. See *Thornhill v. Weeks* (No. 2). (2) [After dealing with the evidence in detail and holding that the defendants had failed to establish any public right of way his Lordship continued:] The plaintiffs therefore succeed, and on the question of the Andover Council's liability to pay costs I am bound by the view expressed by the Court of Appeal. I am glad that was their view, because in my own opinion it is an extraordinary proposition to put forward that a defendant district council can take over the whole defence of such an action as the present, instruct their own solicitors, get up all the documents and evidence, and perhaps put the plaintiff landowners to enormous expense, and then be entitled to say they are only fighting the main issue on behalf of their co-defendants, and not on their own behalf, and are therefore not liable for costs.

There will be a declaration with costs against all the defendants and an injunction against the original defendants.

Solicitors : *Chapman-Walker & Shephard ; Indermaur & Brown, for W. R. Graham, Andover.*

(1) [1901] 2 K. B. 268.

(2) [1913] 2 Ch. 46, 468.

In re WEDGWOOD.
ALLEN *v.* WEDGWOOD.

[1914 W. 384.]

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Oct. 14,
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Will—Charity—Trust “for the protection and benefit of animals”—Validity.

A testatrix by her will gave her residue upon trust (in the judgment of this Court, differing with Warrington J.) to apply the same for the protection and benefit of animals:—

Held, a good and valid charitable trust, on the ground that it was calculated to promote public morality by checking the innate tendency to cruelty.

APPEAL from a decision of Warrington J.

By her will, dated June 26, 1913, the testatrix Frances Julia Wedgwood appointed the plaintiff and the defendant Cecil Wedgwood to be executors and trustees thereof and, after giving certain pecuniary and other legacies and annuities and making a devise of her freehold house, devised and bequeathed all the residue of her real and personal estate upon trust for conversion and upon further trust (subject to the payment of certain sums therein mentioned and to the setting aside of sums to secure certain annuities) for the defendant Cecil Wedgwood absolutely.

The testatrix died on November 26, 1913, without having revoked or altered her will save by two codicils which are not material to be stated, and the said will and codicils were duly proved by the plaintiff and the defendant Cecil Wedgwood.

Doubts having arisen as to whether the testatrix had not given her residue to the defendant Cecil Wedgwood upon certain secret trusts, which might or might not be validly created, an originating summons was taken out by the plaintiff against the defendant Cecil Wedgwood, Bertram Hensleigh Wedgwood, one of the testatrix's next of kin, and the Attorney-General, for the determination of the questions (1.) whether under the circumstances the gift of the residue to the defendant Cecil Wedgwood was an absolute gift to him beneficially or was subject to any secret trust. (2.) If the said gift was subject to any secret trust, whether such trust was a good and valid charitable trust or not,

C. A. and, if not a good charitable trust, whether such secret trust was
1914 validly created or was too vague and uncertain, and had conse-
WEDGWOOD, quently failed for uncertainty.

In re. It appeared from the evidence of the defendant Cecil Wedg-
ALLEN wood that he and the testatrix were both interested in the
v. question of the protection of animals, and that in 1908 she
WEDGWOOD. had asked him to act as her executor in conjunction with
the plaintiff, and also wished him to undertake a further
trust, which was to apply the residue of her estate for the pro-
tection and benefit of animals. She subsequently told him that
her lawyer had suggested that, if she could trust him (the
defendant) to use her residue for the purpose she intended, she
should leave the residue to him absolutely, and to that proposal
he agreed. They discussed the purpose to which the residue
should be applied and the witness suggested that he might help
forward the movement for the humane slaughtering of animals
and also the movement to provide municipal abattoirs where
animals could be properly and decently slaughtered; and the
testatrix agreed that those were the sort of purposes, among
others, which she would like to have forwarded. She wished to
leave him an absolutely free hand to use his judgment as cases
arose where he thought he could be of use to animals.

Warrington J. held that the defendant Cecil Wedgwood was
entitled to the residue absolutely, and not subject to any secret
trust, and declined to consider the question of the validity of the
trust on the hypothesis that its existence had been established.

From this decision the defendant B. H. Wedgwood appealed,
on the ground that the gift of the residue was subject to a
secret trust, and that such trust was not a good or valid
charitable trust, but was void for perpetuity and/or uncertainty.
There was a cross-appeal by the Attorney-General, who con-
tended that the secret trust was a good and valid trust for
charitable purposes.

The appeal came on for hearing on October 14, 1914,
when the Court held, reversing the decision of Warring-
ton J., that the defendant Cecil Wedgwood took the
residuary estate, not beneficially but subject to a secret trust for
the protection and benefit of animals. The question then arose

whether that trust was a good and valid trust for charitable purposes.

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H. Terrell, K.C., and Salter, for the appellant. This is not a good charitable trust. It is not a trust for a purpose beneficial to the community within the fourth of the divisions into which Lord Macnaghten classified "charities" in the legal sense in *Commissioners for Special Purposes of Income Tax v. Pemsel* (1), and it cannot come within any of the other three divisions. It is quite easy to conceive cases in which the protection of animals would not be beneficial to the community or useful to man. There is no limit or qualification to this trust and it is not necessarily applicable in any way for the benefit of mankind.

The whole reasoning in *University of London v. Yarrow* (2) shows that all the charities there spoken of are charities which benefit mankind, and the gift in that case was confined to animals useful to man. In *In re Foveaux* (3) the gift was held charitable merely because its object, which was the stopping of cruelty to animals, advanced morals and education among men and so was for the benefit of mankind. This trust has not any such characteristic, and the mere purpose of the protection of animals is not charitable.

Further, the trust is so wide that it is void for uncertainty: *In re Sidney*. (4) There is no indication what animals are to be protected, whether domestic or wild, or whether useful to man or not.

Austen-Cartmell, for the Attorney-General. This is a good charitable trust. Gifts for the prevention of cruelty to the lower animals, whether domestic or not, for promoting prosecutions for cruelty to animals, and for the protection of animals from vivisection and even for the total suppression of vivisection have been held to be good charitable gifts: *Tudor on Charities and Mortmain*, 4th ed. pp. 60, 61, and the cases there cited; *Armstrong v. Reeves* (5); *Marsh v. Means* (6); *In re Foveaux* (7);

(1) [1891] A. C. 531, 583.

(4) [1908] 1 Ch. 488.

(2) (1857) 1 De G. & J. 72.

(5) (1890) 25 L. R. Ir. 325.

(3) [1895] 2 Ch. 501.

(6) (1857) 3 Jur. (N.S.) 790.

(7) [1895] 2 Ch. 507.

C. A. *In re Cranston*. (1) [He also referred to *In re Dean* (2) and
 1914 *In re Douglas*. (3)]
 WEDGWOOD, *H. Terrell, K.C.* in reply. The Irish cases proceeded upon the
In re. ground that the object of the donor was to confer a public benefit.
 ALLEN There is nothing in this case to show that the testatrix believed
v. that what she was doing was for the public benefit. Her wish
 WEDGWOOD. was to benefit animals and not the human race. The trust is in
 the widest terms and not limited to the benefit of the human
 race. Where the trust may include objects which are not chari-
 table it is bad altogether: *Williams v. Kershaw*. (4)
 [LORD COZENS-HARDY M.R. The books are full of cases of
 that kind.]

Austen-Cartmell. I do not dispute that; *Hunter v. Attorney-General* (5) is the most recent case.]

If the trust be supported it must be on the ground that it is for a general public purpose: *In re Nottage*. (6) The principle is clear that the trust must be intended for the benefit of the public or a section of the public; and it must limit the application of the fund to objects which are for the public benefit. Those two propositions are essential to a good charitable trust. Here the object of the testatrix was to benefit dumb animals, towards which she had kindly feelings, and not to benefit the human race. This fund, under the terms of the trust, might be applied for the feeding of sparrows in winter, which could not be good because it would not be for the public benefit. The gift fails.

Clauson, K.C., and *Harman*, for the defendant executor, took no part in the argument upon this point.

Cur. adv. vult.

Oct. 29. LORD COZENS-HARDY M.R. It having been decided that Cecil Wedgwood takes the residuary estate not beneficially but upon a secret trust, it remains to consider what is the trust and whether it is charitable. The terms of the trust are "for the protection of animals" or "for the protection and benefit of animals." The movement for the humane slaughtering of animals and the

(1) [1898] 1 I. R. 431.

(2) (1889) 41 Ch. D. 552.

(3) (1887) 35 Ch. D. 472.

(4) (1835) 5 Cl. & F. 111.

(5) [1899] A. C. 309.

(6) [1895] 2 Ch. 649, 656.

provision of municipal abattoirs were mentioned as the sort of purpose the testatrix would like to have forwarded. The word "charity" has a much wider meaning in law than it has in popular speech. The Courts have held that the particular objects mentioned in the Statute of Elizabeth, namely, (1.) relief of the poor, (2.) religion, (3.) education, are not exhaustive. By analogy a large class of other objects have been included. Lord Macnaghten's judgment in *Pemsel's Case* (1) is perhaps the leading authority. But I am content to adopt what was said by FitzGibbon L.J. in *In re Cranston* (2): "Any gift which proceeds from a philanthropic or benevolent motive, and which is intended to benefit an appreciably important class of our fellow creatures (including, under decided cases, animals), and which will confer the supposed benefit without contravening law or morals, will be charitable." It may be, and indeed I think it is, true that there has been a tendency to enlarge the meaning of the word charity, and that gifts have within the last fifty years been supported as good charitable gifts which 150 years ago would not have been supported. The authorities are very numerous. I need only refer to a few. In *University of London v. Yarrow* (3) it was held that a trust for the benefit of animals useful to man was good, and there was a clear intimation of opinion that the limitation to domestic animals was not necessary. In *Tatham v. Drummond* (4) the establishment of a slaughter-house for horses was held to be charitable, though the gift failed as it involved the purchase of land. The Society for the Prevention of Cruelty to Animals, the Society for the Abolition of Vivisection, and a Home for lost dogs are instances in which the doctrine has been extended.

In my opinion it is not possible for us to hold that this trust for the protection of animals is not a good charitable purpose. Apart from authorities which are binding upon us, I should be prepared to support the trust on the ground that it tends to promote public morality by checking the innate tendency to cruelty. In the language of Holmes L.J. in *In re Cranston* (5),

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(1) [1891] A. C. 531.

(3) 1 De G. & J. 72.

(2) [1898] 1 I. R. 446.

(4) (1864) 4 D. J. & S. 484.

(5) [1898] 1 I. R. 457.

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“gifts the object of which is to prevent cruelty to animals and to ameliorate the position of the brute creation are charitable. . . . If it is beneficial to the community to promote virtue and to discourage vice, it must be beneficial to teach the duty of justice and fair treatment to the brute creation, and to repress one of the most revolting kinds of cruelty.” I desire also to mention the judgment of Chatterton V.-C. in *Armstrong v. Reeves* (1), especially the passage at p. 341, where he points out that objects of general mercy to animals of all kinds, whether useful to man or not, are charitable.

There must be a declaration that the trust in the terms which I have mentioned is a good charitable trust. The selection of the particular mode of applying the fund, both principal and income, will rest with Mr. Cecil Wedgwood during his life. The costs of all parties of this appeal must be provided for out of residue, as in the Court below.

KENNEDY L.J. In this case the Court has already pronounced its decision that the bequest of the residuary real and personal estate of the testatrix to the defendant Cecil Wedgwood constituted not an absolute gift to him beneficially, but was subject to a secret trust. The question reserved for further consideration was whether or not such trust was a good and valid charitable trust.

It is a trust for the protection and benefit of animals. We know from the evidence that two objects which, in the opinion of the testatrix, would come within the purview of her generosity were the more humane slaughtering of animals and the establishment of municipal abattoirs.

It was contended by Mr. Terrell and Mr. Salter on behalf of the next of kin that this is too wide, too vague, and too uncertain. A review of the relevant authorities shows, I think, that during the past century there has been a growing tendency to enlarge the area of purposes which will be treated by Courts of Equity as charitable purposes, whilst still in theory only those objects of general public utility are charitable, in the legal sense of the term, which either are included in, or are analogous to, the

objects mentioned in the preamble of the Act 43 Eliz. c. 4: see especially the judgment on this point of Rigby L.J. in *In re Nottage*. (1) In the course of his judgment in *Commissioners for Special Purposes of Income Tax v. Pemsel* (2) Lord Macnaghten took from the argument of Sir Samuel Romilly in *Morice v. Bishop of Durham* (3) a classification of the objects, within which all charity to be administered in the Court of Chancery must fall, into four divisions, i.e., trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads. Sir Samuel Romilly, as Lord Lindley (then Lindley L.J.) points out in *In re Macduff* (4), rightly described the fourth division, within which Mr. Austen-Cartmell argues that this trust falls, as the most difficult. "I don't know," said Holmes L.J. in the Irish case of *In re Cranston* (5), "a better classification, and yet it is obvious that the fourth head is altogether vague and indeterminate." "The essential attributes of a legal charity," said FitzGibbon L.J. in the same case, "are, in my opinion, that it should be unselfish—that is for the benefit of other persons than the donor—that it shall be public, that is that those to be benefited shall form a class worthy, in numbers or importance, of consideration as a public object of generosity, and that it shall be philanthropic or benevolent, that is dictated by a desire to do good." In *Goodman v. Saltash Corporation* (6) Earl Cairns, in the course of his speech, speaking of a condition that the free inhabitants of ancient tenements in the borough of Saltash should have a right of dredging for oysters in the estuary, said that such a condition would create that which in the very wide language of our Courts is called a charitable, that is to say, a public, trust or interest for the benefit of the free inhabitants of ancient tenements. "To be a charity," said Chitty L.J. (then Chitty J.) in *In re Foveaux* (7), "there must be some public purpose—something tending to the

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(1) [1895] 2 Ch. 649, 656.

(2) [1891] A. C. 583.

(3) (1805) 10 Ves. 522, 532.

(4) [1896] 2 Ch. 451, 467.

(5) [1898] 1 I. R. 446, 452.

(6) (1882) 7 App. Cas. 633.

(7) [1895] 2 Ch. 504.

C. A. benefit of the community," and he adds a little later in his judgment, "In examining the purposes of any particular trust

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the Court has taken a liberal rather than a narrow view of the subject." "We have gone much further," said the Master of the Rolls in Ireland in 1898, "than the words of that statute" (the first Irish Poor Law Act of Elizabeth), "and the tendency of late years has been where a testator dedicates part of his property towards an object which is not illegal in itself, to give effect to the intention unless there is some coercive reason to the contrary": *In re Cranston*. (1) It would be easy to cite cases illustrating this attitude of liberality; but, turning now to the decisions on gifts expressed to be, in one way or another, for the benefit of animals, which are the decisions particularly pertinent to the consideration of the question before us, we find, I think, sufficient authority for maintaining, as I hold that we ought to maintain, the validity of the gift, general as its terms are, in the present case. The earlier cases, of which there are several, are cited in the arguments of counsel and the judgment of Chitty J. in *In re Foveaux* (2), to which I have already referred, and it is unnecessary to refer to them at length. It is, however, I think, having regard to the argument addressed to us by counsel for the appellant, material and right to note that the validity of the gift as a charitable gift has not been affirmed only in cases in which the animals for whose benefit the gift was bequeathed were domestic animals or animals useful to man. Gifts to the Royal Society for the Prevention of Cruelty to Animals and to the Society for the Protection of Animals liable to Vivisection have been held good charitable gifts, and in neither case are the purposes of the named society limited to useful or domestic animals. In the case of *Marsh v. Means* (3) and in the case of *In re Vallance* (4), both of which are referred to by Chitty J., the object appears to have been the prevention of cruelty to animals generally. "Cruelty," he adds towards the close of his judgment, "is degrading to man; and a society for the suppression of cruelty to the lower animals, whether domestic or not, has for its object, not merely the protection of the animals themselves, but

(1) [1898] 1 I. R. 435.

(3) 3 Jur. (N.S.) 790.

(2) [1895] 2 Ch. 501, 507.

(4) Seton, 5th ed. 1141.

the advancement of morals and education among men." In the Irish case of *Armstrong v. Reeves* (1) Chatterton V.-C. in the course of his judgment said in reference to cruelty to animals, "In my opinion, it is for the benefit of the public that such cruelty should be prevented; and that any society for the prevention of cruelty to animals, whether domestic animals or not, is within the scope of charitable institutions." In *In re Cranston* (2), which I have referred to, Holmes L.J. used very similar language: "There is really no difference amongst thoughtful and civilized men on this subject. If it is beneficial to the community to promote virtue and to discourage vice, it must be beneficial to teach the duty of justice and fair treatment to the brute creation, and to repress one of the most revolting kinds of cruelty."

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It was contended in the argument addressed to us against the validity of this particular bequest as a charitable gift that it fails on account of such vagueness and generality of expression as would justify its application by the trustee to the protection and maintenance of noxious animals, and counsel instanced, if I remember rightly, lions and tigers. Now it is quite true, as laid down by Lindley L.J. in *In re Macduff* (3), that when we are dealing with general words we must consider whether there is such an indication of purpose or of trust that the Court, if called upon to execute it, can see what it has to do—can see the limits of its own powers. But, at the same time, I can entertain no doubt that if the Court should now be asked to say whether the trustee under this bequest for the protection and benefit of animals was fulfilling his duty in expending the fund upon the preservation of beasts of prey or mad dogs the Court would not find any difficulty as to the answer which is dictated by reason and common sense. There are, I suppose, very few, if any, charities of a wide character, such as, to take an imaginary case, a charity for the relief of poor mechanics, in regard to which it would not be easy for ingenuity to suggest difficulties of discrimination.

In my opinion, the secret trust contained in the will of Miss Wedgwood is a valid charitable trust.

(1) 25 L. R. Ir. 341.

(2) [1898] 1 I. R. 431, 457.

(3) [1896] 2 Ch. 463, 464.

C. A. SWINFEN EADY L.J. It has already been decided that Mr.
 1914 Cecil Wedgwood does not take the residue beneficially, but that
 WEDGWOOD, it is subject to a secret trust. There remains the question
In re. whether it has been validly given upon trust, or whether the
 ALLEN next of kin have become entitled. The trust was to apply the
 v. residue "for the protection of animals," or "for the protection
 WEDGWOOD. and benefit of animals," the testatrix having assented to the
 suggestion that the movement for the humane slaughtering of
 animals and the movement for providing municipal abattoirs in
 the place of ordinary slaughter-houses were the sort of purposes,
 among others, which she would like to be supported. The object
 of the trust being thus ascertained and defined, the question
 arises, is this a valid charitable trust? In my opinion it is. It⁷
 is a gift for a general public purpose beneficial to the com-
 munity. A gift for the benefit and protection of animals tends
 to promote and encourage kindness towards them, to discourage
 cruelty, and to ameliorate the condition of the brute creation,
 and thus to stimulate humane and generous sentiments in man
 towards the lower animals, and by these means promote feelings
 of humanity and morality generally, repress brutality, and thus
 † elevate the human race. That such purposes are eminently
 charitable, in the accepted legal sense of that term, is amply
 established by the cases to which the Master of the Rolls has
 referred. In *In re Foveaux* (1) Chitty J. decided that certain
 societies for the suppression and abolition of vivisection were
 charities within the legal definition of the term charity. He
 said, "Cruelty is degrading to man; and a society for the
 suppression of cruelty to the lower animals, whether domestic
 or not, has for its object, not merely the protection of the
 animals themselves, but the advancement of morals and educa-
 tion among men. The purpose of these societies, whether they
 are right or wrong in the opinions they hold, is charitable in
 the legal sense of the term. The intention is to benefit the
 community." Those observations, in which I entirely concur,
 equally apply to the trust constituted by the testatrix, which
 in my opinion is a valid charitable trust.

(1) [1895] 2 Ch. 501, 507.

LORD COZENS-HARDY M.R. Mr. Austen-Cartmell has been good enough to hand to me the form of order that he proposes, which I will read. "Discharge the order of Mr. Justice Warrington in so far as it declares on the true construction of the testatrix's will, and in the events that have happened, the gift in the will contained of the real and residuary personal estate to the defendant Cecil Wedgwood was an absolute gift to him beneficially and was not subject to any charitable trust." That is right of course. Then, "And declare that the said gift was not an absolute gift to the defendant Cecil Wedgwood beneficially, but was subject to the trust for the application thereof as to both capital and income for the protection and benefit of animals in such manner as he shall think fit, and that such trust is a good and valid trust for a public and charitable purpose"—that is right. Then, "And the Attorney-General not at present asking for a scheme or for the administration of the testatrix's estate, and the defendant Cecil Wedgwood by his counsel undertaking to furnish proper accounts of the testatrix's estate to the Attorney-General and to render to the Attorney-General an annual account and statement of the application of the trust fund and the income thereof, liberty to the Attorney-General to apply for administration or otherwise."

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Solicitors: *Waterhouse & Co.; The Solicitor to the Treasury.*

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ATTORNEY-GENERAL *v.* LONG EATON URBAN
DISTRICT COUNCIL.

[1913 A. 947.]

Local Authority—Electric Supply—Power and Lighting—Similar Circumstances—Differentiation in Charges—Undue Preference—Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), ss. 19, 20.

The Electric Lighting Act, 1882, provides by s. 19, "Where a supply of electricity is provided in any part of an area for private purposes, then except in so far as is otherwise provided by the terms of the license, order, or special Act authorising such supply, every company or person within that part of the area shall, on application, be entitled to a supply on the same terms on which any other company or person in such part of the area is entitled under similar circumstances to a corresponding supply"; and by s. 20, "The undertakers shall not, in making any agreements for a supply of electricity, show any undue preference to any local authority, company, or person, but, save as aforesaid, they may make such charges for the supply of electricity, as may be agreed upon, not exceeding the limits of price imposed by or in pursuance of the license, order, or special Act authorising them to supply electricity."

The defendants, who were the undertakers under the Long Eaton Electric Lighting Order, 1900, and with and under the powers and obligations imposed by that Order and the Electric Lighting Act, 1882, issued a circular with reference to the price proposed to be charged for electricity to power consumers, the effect of which was in certain cases to make a lower charge for power purposes to consumers who in addition to a supply for power took from the defendants exclusively a supply of electricity for lighting purposes, and a higher charge to consumers of electricity for power only or for power and partial lighting:—

Held by the Court of Appeal, affirming the decision of Sargant J. [1914] 2 Ch. 251, that the differentiation proposed by the circular was a breach of both ss. 19 and 20 of the Electric Lighting Act, 1882.

APPEAL from a decision of Sargant J. (1)

The action was brought by the Attorney-General at the relation of the Long Eaton Gas Company for an injunction to restrain an alleged breach by the defendants of the provisions of ss. 19 and 20 of the Electric Lighting Act, 1882. The defendants were the undertakers under the Long Eaton Electric Lighting

(1) [1914] 2 Ch. 251.

Order, 1900, having the powers and being subject to the obligations (within their area) given and imposed by that Order and the Electric Lighting Acts, 1882 and 1888. This area was, in whole or in part, within the area within which the relators were empowered to supply gas under the Long Eaton Gas Act, 1901.

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The question in the action arose out of the following circular issued by the council on or about September 25, 1911:—

“Dear Sir,—I am directed by my council to inform you that the following resolution has been adopted with reference to the price charged for electricity to power consumers, and which will take effect as stated therein:—Revision of Electricity Charges. —Committee having fully considered this matter, recommend that the present scale of charges remain in force where power and lighting are both taken exclusively from the council's electricity mains, but in cases where electricity supply is taken for power only, or for power and partial lighting, the lowest scale of charges where the number of units consumed during any quarter exceeds 4000 shall be 1*d.* per unit, and otherwise according to existing scale. Such amended charge to commence January 1, 1912.”

At that date the scale of charges was—(1.) for lighting houses, shops, and other premises, except factories, a flat rate of 3½*d.* per unit, less 10 per cent. discount; (2.) for lighting factories, 3*d.* per unit for the first 2000 units per quarter, afterwards 2*d.* per unit, less in each case certain discounts increasing with the amount of the account; and (3.) for power or heating for a consumption not exceeding 250 units per quarter, 2*d.* per unit, and for larger consumptions per quarter a gradually decreasing charge per unit, until for a consumption between 4000 and 6000 units per quarter the rate was 1*d.* per unit, and for a consumption exceeding 6000 units per quarter the rate was ¾*d.* per unit.

The effect of the change proposed by the circular therefore was that where power and light were both taken exclusively from the defendants for a consumption exceeding 6000 units per quarter the rate was ¾*d.* per unit, but where power or power and partial lighting only were so taken the rate for the same consumption was 1*d.* per unit.

The relators alleged that the differentiation expressed in the

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circular was a breach of both ss. 19 and 20 of the Electric Lighting Act, 1882.

Sargant J. declared that the defendants, in making the differentiation referred to in the circular dated September 25, 1911, between those consumers of the defendants' electricity of over 6000 units per quarter for power who did and those who did not take their lighting exclusively from the defendants, were acting in breach of the provisions of ss. 19 and 20 of the Electric Lighting Act, 1882. (1) He gave liberty to the plaintiff to apply for an injunction if necessary, no such application to be made pending appeal.

The defendants appealed.

Vesey Knox, K.C., Martelli, K.C., and Courthope-Munroe, K.C., for the appellants. Sargant J. was wrong in considering only the question of the relative cost of supply and in refusing to take into consideration the question of competition as regulating the charges of the undertakers. In the railway cases competition has been allowed to be taken into consideration: *Phipps v. London and North Western Ry. Co.* (2).

[The Court intimated that the only question to be considered was whether the declaration made by Sargant J. was right having regard to the circular.]

What is prohibited by ss. 19 and 20 is the supplying of electricity to persons under similar circumstances at different rates, and giving an undue preference. The appellants have never done either of these prohibited things. The circular has

(1) Electric Lighting Act, 1882, s. 19: "Where a supply of electricity is provided in any part of an area for private purposes, then except in so far as is otherwise provided by the terms of the license, order, or special Act authorising such supply, every company or person within that part of the area shall, on application, be entitled to a supply on the same terms on which any other company or person in such part of the area is entitled under similar circumstances to a corre-

sponding supply."

Sect. 20: "The undertakers shall not, in making any agreements for a supply of electricity, show any undue preference to any local authority, company, or person, but, save as aforesaid, they may make such charges for the supply of electricity, as may be agreed upon, not exceeding the limits of price imposed by or in pursuance of the license, order, or special Act authorising them to supply electricity."

(2) [1892] 2 Q. B. 229.

never been acted upon, and the Court ought not to declare that the appellants are not entitled to do what they never have done. Where one consumer takes power and light exclusively from the undertakers, and another power or power and partial light only, the circumstances are not similar; there is therefore in this case no breach of s. 19, and no undue preference within s. 20.

Romer, K.C., and Percy F. Wheeler, for the respondents, were not called upon.

LORD COZENS-HARDY M.R. This is an appeal from Sargant J., who has made a declaration in the following terms. [The Master of the Rolls read the declaration above set out and continued:] Before going further I wish to deal with one point which counsel for the appellants have raised, namely, that whatever the circular may say the appellants would do, they never have done it. That seems to me to be absolutely irrelevant. It is as old as the hills that if a man threatens that he intends to do something which is unlawful, and asserts a right to do it, the Court will grant an injunction to restrain him. It is wholly irrelevant to say whether he has done it or has not.

The Long Eaton Urban District Council have been the undertakers of an electric light works at Long Eaton for some years, and it has been a very prosperous concern. They supply electricity for both lighting purposes and for power, and on September 25, 1911, they issued the circular which is referred to in the Order. [The Master of the Rolls read the circular and continued:] Has that circular been withdrawn? No. Did the defendants in their pleadings in this action say: "We undertake not to act upon it; we admit it is wrong"? No. By their defence they said it was quite right, and that they were justified in acting on it. I cannot listen for a moment to the suggestion that if that circular was wrong the declaration was improper, because they in fact have chosen not to enforce it in a number of instances, or even in any case. They have no right to threaten, or intend, to do that, if the circular is wrong. As to whether the circular is right or wrong I feel bound to say that I have difficulty in treating the matter seriously; it seems to me to be so plainly wrong that I do not

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propose to waste many words upon it. Sect. 19 of the Act says: [The Master of the Rolls read the section and continued:] To take an instance which I should think is not uncommon, and which was put to counsel in argument: suppose there are two factories, similar in situation, similar in extent, both of which are supplied with electricity for lighting and for power. Is there any reason for justifying different charges being made to the owners of those factories because one of them may have a portion of his factory, or another small factory, which is not supplied with electric lighting, but is supplied with gas, or acetylene gas, or whatever it may be? It seems to me that such a differentiation would be directly contrary to s. 19, which says that each of those two owners is to be entitled to a supply on the same terms. They are not supplied on the same terms, although the circumstances are similar. There is no possible justification, as it seems to me, for differentiation between the two. I think also that this case falls within s. 20, which says that the undertakers shall not, in making any agreement for a supply of electricity, show any undue preference to any local authority, company, or person.

The only point which Sargant J. has decided is that in making the differentiation referred to in the circular the council are acting in breach of the provisions of ss. 19 and 20 of the Electric Lighting Act, 1882. In my opinion that declaration is perfectly right. That is the only question which we have to consider, and I think that this appeal must be dismissed with costs.

KENNEDY L.J. I am of the same opinion.

SWINFEN EADY L.J. I agree.

Solicitors for appellants: *Lees & Co., for E. Williams, Long Eaton.*

Solicitors for respondents: *R. W. Cooper & Sons, for Fraser & Son, Nottingham.*

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In re LORD LAWRENCE.

LAWRENCE *v.* LAWRENCE.

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ASTBURY J.

June 10, 11.

*Will—Legal Devise—Strict Settlement—Compendious Form—Construction—
Devise to “every son of mine and his issue male in succession, so that” etc.
—First Words treated as merely introductory to subsequent Limitations—
Rule in Shelley’s Case.*

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A testator devised his real estate “unto and to the use of every son of mine and his issue male in succession so that every elder son and his issue male be preferred to every younger son and his issue male and that my grandsons respectively with their respective issue male take in succession according to their respective seniorities and so that every such son and every such grandson who shall be begotten in my lifetime take an estate for his life without impeachment of waste with remainder to his first and every subsequent son successively according to seniority in tail male and that every such grandson who shall be begotten after my death take an estate in tail male” with remainder over.

On the testator’s death his eldest son succeeded to the estate and subsequently died without executing any disentailing assurance, leaving his only son, the plaintiff, as his successor. The plaintiff was born in the testator’s lifetime:—

Held by Astbury J. and the Court of Appeal, that the initial words of the devise were not intended to confer any estate on any one but were merely introductory to the effective limitations that followed, and consequently the plaintiff and his father before him were only life tenants.

In re Simcoe [1913] 1 Ch. 552 distinguished.

ORIGINATING SUMMONS.

By his will dated March 11, 1872, a testator devised his real estate “unto and to the use of every son of mine and his issue male in succession so that every elder son and his issue male be preferred to every younger son and his issue male and that my grandsons respectively with their respective issue male take in succession according to their respective seniorities and so that every such son and every such grandson who shall be begotten in my lifetime take an estate for his life without impeachment of waste with remainder to his first and every subsequent son successively according to seniority in tail male and that every such grandson who shall be begotten after my death take an

C. A. estate in tail male " with remainder to the use of the trustees
1914 upon trust for sale.

LAWRENCE The testator died on June 27, 1879. His eldest son succeeded
(LORD), to the estate and died on August 22, 1913, without executing any
In re. disentailing assurance, and leaving his only son, the plaintiff, as
LAWRENCE his successor. The plaintiff was born in the testator's lifetime.
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On March 23, 1914, the plaintiff issued this summons to determine (inter alia) whether on the true construction of the will he was a life tenant or a tenant in tail male.

The summons came on for hearing before Astbury J. on June 10, 1914.

Wilfrid A. Greene, for the plaintiff. In this case the technical words "issue male" clearly include the whole line of inheritable issue and cannot be limited to sons or grandsons. The devise "unto and to the use of every son of mine and his issue male in succession" therefore gave the plaintiff's father an estate in tail male to which the plaintiff has succeeded. The subsequent words beginning with "so that" are merely explanatory. They are insufficient to cut down the estate in tail male given by the technical words, and, so far as inconsistent with the devolution of that estate, they must be disregarded: *In re Simcoe* (1); *In re Keane's Estate* (2); *Jesson v. Wright* (3); *Roddy v. Fitzgerald* (4); *Van Grutten v. Foxwell* (5); *Fetherston v. Fetherston* (6); *Jordan v. Adams*. (7)

Dighton Pollock, for the plaintiff's son. Reading the devise as a whole it is quite clear that the initial words are not intended to confer any estate at all, but are merely a brief introductory description of the effective limitations that follow, under which the plaintiff's father and the plaintiff were life tenants. The case comes within the fourth rule in *Montgomery v. Montgomery*. (8)

Edward Beaumont, for the trustees, who were younger sons of the testator. The intention was to make an ordinary strict

(1) [1913] 1 Ch. 552, 557.

676, 684.

(2) [1903] 1 I. R. 215, 224.

(6) (1835) 3 Cl. & F. 67, 74, 75,

(3) (1820) 2 Bli. 1, 53, 56, 57.

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(4) (1858) 6 H. L. C. 823, 875,
877, 881.

(7) (1861) 9 C. B. (N.S.) 483, 497,
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(5) [1897] A. C. 658, 662, 672—

(8) (1845) 3 J. & Lat. 47, 51.

settlement under which sons were to take life estates, and grandsons begotten in the testator's lifetime were also to take life estates. This can be effected concisely by a "so that" clause explaining the introductory words. See for instance Hayes and Jarman's Concise Forms of Wills, 7th ed. (1869) p. 379, where the sons' estates are limited to life estates by a "so that" clause. A similar limitation could obviously be made as to grandsons begotten in the testator's lifetime. (1) It can of course be effected at greater length by a general devise in strict settlement followed by a cutting down proviso which may either be confined to tenants in tail male by purchase, as in Key and Elphinstone's Precedents, 8th ed. (1904) vol. ii. p. 902 [9th ed. (1909) vol. ii. p. 969], or may be extended to tenants in tail male inheritable, as in Davidson's Precedents, 3rd ed. (1880) vol. iv. p. 392.

In *In re Simcoe* (2) and *In re Keane's Estate* (3) there was no attempt to explain or modify the estate originally limited to the named first taker, whatever it was, and no estate was conferred on him by the subsequent limitations. The attempted modifications were confined to the estates of the subsequent takers. In the present case the subsequent limitations apply to all takers. The testator has merely done in one sentence what is often done in two and has in effect made a devise "unto and to the use of every son of mine and his issue male in succession in manner hereinafter appearing," the initial words being merely introductory and conferring no estate at all. The authorities are collected in Theobald on Wills, 6th ed., pp. 404—413 [7th ed. pp. 415—424], but there is nothing in them to prevent the Court giving effect to a common form in everyday use.

Wilfrid A. Greene in reply. The testator might have explained that he was using the words "issue male" in a definite limited sense: Hawkins on Wills, 2nd ed. pp. 226, 229; Jarman on Wills, 6th ed. vol. ii. p. 1899. The "so that" clauses might

(1) This is actually done in the miscellaneous form in Hayes and Jarman, 7th ed. p. 451, which is practically identical with the above devise. It is indexed under "Devise of free-

hold estates in strict settlement, short form of," and appears in subsequent editions.

(2) [1913] 1 Ch. 552.

(3) [1903] 1 I. R. 215.

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C. A. be used for this purpose. But when once it is clear that the
 1914 testator was using the words in their technical sense, the
 LAWRENCE "so that" clauses cannot alter the legal effect of the technical
 (LORD), words. The initial words cannot therefore be treated as merely
In re. introductory so as to carry out the testator's obvious intention,
 LAWRENCE but the devise must be read as a devise "unto and to the use
 v. of every son of mine in tail male in succession so that" etc.,
 LAWRENCE. and the subsequent limitations must consequently be dis-
 ——— regarded.

In *In re Simcoe* (1) the testator devised his real estate to the plaintiff, a bachelor, "and his issue male in succession, so that every elder son and his issue male may be preferred to every younger son and his issue male, and so that every such son may take an estate for his life with remainder to his first and every subsequent son successively according to seniority in tail male, and on failure of such issue" over. It was contended that the "so that" clauses showed that by "issue male" the testator meant "sons" and intended to give the estate to the plaintiff for life with remainder to his first unborn son for life with remainder to that son's unborn sons successively in tail male, and that these intended limitations though void under the double possibility rule could be carried out *cy près*. Swinfen Eady J., however, held that the testator had used the words "issue male" as including the whole line of inheritable issue, and therefore, notwithstanding the "so that" clauses, the plaintiff took an estate in tail male. The present case is substantially indistinguishable.

ASTBURY J. (after reading the devise). The plaintiff contends that the devise "unto and to the use of every son of mine and his issue male in succession" created an estate in tail male in the first taker and that the subsequent limitations are insufficient having regard to the authorities to carry out the testator's obvious intention that his eldest son should take a life estate, and his eldest grandson, if begotten in the testator's lifetime, should take a life estate with remainder to his sons in tail male,

(1) [1913] 1 Ch. 552.

The question, as candidly admitted by the plaintiff's counsel, is whether the authorities are too strong to enable the testator's obvious intention to be carried out.

Before dealing with the authorities I will refer to some well-known conveyancing precedents for the purpose of showing the character of the limitations that the testator obviously intended to make.

In Hayes and Jarman's Concise Forms of Wills, 7th ed. (1869) p. 379, I find a devise "to every son of mine, and his issue male in succession, so that every elder son and his issue male may be preferred to every younger son and his issue male, and so that every such son may take an estate for his life, with remainder to his first and every subsequent son successively, according to seniority, in tail male." That is precisely the same limitation as is contained in the present will so far as the son's estate is concerned, omitting the further limitation as to the estate of the grandson.

In Key and Elphinstone's Precedents, 8th ed. (1904) vol. ii. p. 901, I find a devise "to the use of my sons severally and successively according to seniority for life, with an immediate remainder after the death of each of my sons to the use of his sons severally and successively according to seniority in tail male with an ultimate remainder to the use of my own right heirs; and I declare that the estate of every tenant for life hereunder shall be without impeachment of waste: Provided always that if any grandson of mine hereby made tenant in tail male by purchase shall be born in my lifetime his estate in tail male shall not take effect, and in lieu thereof I devise the said hereditaments to the use of such grandson for his life, with remainder to his sons severally and successively according to seniority in tail male."

In Davidson's Precedents, 3rd ed. (1880) vol. iv. p. 392, I find a proviso following upon the ordinary limitations in tail male, namely, "Provided always, that every person actually born in my lifetime (but not any person en ventre sa mère at my decease), who, under the limitations hereinbefore contained, would be entitled or inheritable to an estate in tail male in the said premises hereinbefore devised, shall in the place and

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order in which he would be entitled or inheritable as aforesaid, take therein in lieu of the estate in tail male to which he would have been entitled or inheritable as aforesaid, an estate for his life only without impeachment of waste, with remainder after the death of such person, and the death and failure of issue male of his sons born in my lifetime (if any), to his sons born after my decease successively, according to their respective seniorities in tail male."

In Hawkins on Wills, 2nd ed. p. 226, Mr. Hawkins observes: "Perhaps the strongest of all rules of construction is that which defines the meaning of 'heirs of the body,' when used in devises of real estate. Not only are the words highly technical, implying both an unlimited series of objects and a fixed order of succession, but it would be difficult, in most cases, to find any secondary meaning for them which could carry out any probable intention on the part of the testator. It has therefore become by degrees established as an inflexible rule, where the testator has not explained the words in question as having been used in some other sense, that" an estate tail follows. On p. 229, with regard to a testator's words of explanation, Mr. Hawkins continues: "If the testator himself explain the words in question in a secondary sense, as by saying in effect 'by heirs of the body—I mean first and other sons,' &c., the rule is excluded" and certain other methods of explanation of that character follow.

The real question in the present case is whether the testator has given absolutely an estate in tail male to his eldest son, or whether taking the devise as a whole he has sufficiently provided for a successive series of limitations to his eldest son for life with remainder to his eldest grandson if begotten in his lifetime for life with remainders over as obviously intended.

In Jarman on Wills, 6th ed. (1910) vol. ii. p. 1899, I find the following passage: "It is not to be inferred from the preceding cases that the words, 'heirs of the body,' are incapable of control or explanation by the effect of superadded expressions, clearly demonstrating that the testator used those words in some other than their ordinary acceptation, and as descriptive of another class of objects. The rule established by those cases only requires a clear indication of intention to this effect."

I will now deal with the authorities cited. In *In re Simcoe* (1) a testator devised his real estate to his nephew, a bachelor, "and his issue male in succession, so that every elder son and his issue male may be preferred to every younger son and his issue male, and so that every such son may take an estate for his life with remainder to his first and every subsequent son successively according to seniority in tail male, and on failure of such issue" over. It was held in a very lucid and able judgment that the plaintiff was entitled to an estate in tail male in possession.

The limitations, however, in *In re Simcoe* (1) differ in nearly every respect from those in the present case. In *In re Simcoe* (1) there was clearly an estate in tale male limited to the named nephew—the plaintiff—unless it was cut down by the subsequent limitations. But the subsequent limitations did not in any way purport to cut down the estate in tail male devised to the nephew, but merely purported to deal with the estates of his issue, treating them as taking by purchase under the will, which the Court held was not the case. Further there was no provision there, such as I find in the present case, for a compendious limitation of the estate according to whether the persons intended to be benefited were or were not begotten in the testator's lifetime and so capable of having the limitation in tail male postponed for a further period.

Swinfen Eady J. says (2): "If the devise had contained only the words 'I devise all my real estate to my said nephew John Henry Walcot Vowler and his issue male in succession' there could have been no doubt that the devisee would have taken an estate in tail male in possession." That equally applies here. He then refers to the well-known rule stated by Lord Redesdale in *Jesson v. Wright* (3) that "technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise." Then he cites the observations of Lord Macnaghten in *Van Grutten v. Foxwell* (4) and Lord Wensleydale in *Roddy v. Fitzgerald* (5) on that rule and proceeds: "The question then is: Do the words

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(1) [1913] 1 Ch. 552.

(3) 2 Bli. 1, 57.

(2) [1913] 1 Ch. 557.

(4) [1897] A. C. 658, 672.

(5) 6 H. L. C. 823, 877.

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 1914 that the testator did not use the technical words in their
 LAWRENCE appropriate sense and also clearly shew the true sense in which
 (LORD), he did use them." After reading the judgment of Ross J. in *In*
In re. *re Keane's Estate* (1) and certain passages from the judgments of
 LAWRENCE Lord Macnaghten and Lord Davey in *Van Grutten v. Foxwell* (2)
 v. the learned judge, applying the test laid down in those cases, held
 LAWRENCE that in the case before him the words "issue male in succession"
 Astbury J. were equivalent to "heirs male of the body" and embraced the
 whole inheritable issue taking in a course of descent, and
 consequently the plaintiff took an estate in tail male in
 possession.

I have now to deal with the earlier cases, most of which are referred to in *In re Simcoe*. (3) In *Jesson v. Wright* (4) the question was whether the rule in *Shelley's Case* (5) was excluded by the particular limitations, and it was held that it was not. Lord Eldon L.C. said (6): "The words 'heirs of the body' will indeed yield, to a clear particular intent, that the estate should be only for life, and that may be from the effect of super-added words, or any expressions showing the particular intent of the testator; but that must be clearly intelligible, and unequivocal." Lord Redesdale said (7): "The rule is, that technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise."

In *Roddy v. Fitzgerald* (8), which again was a question of the applicability or otherwise of the rule in *Shelley's Case* (5), Lord Cranworth said: "Prima facie, the word 'issue' used as it is in this will has the same meaning as the words 'heirs of the body,' and provisions which are insufficient to cut down and restrain the meaning of the words 'heirs of the body' must be also insufficient to qualify or alter the effect of the word 'issue.'"

Dealing with the present will in the light of those two authorities, it is perfectly obvious that the first sentence of this compound limitation, if it had stood alone, would have clearly given

(1) [1903] 1 I. R. 215, 224.

(2) [1897] A. C. 658, 673, 684.

(3) [1913] 1 Ch. 552.

(4) 2 Bli. 1.

(5) (1581) 1 Rep. 93b.

(6) 2 Bli. 53.

(7) 2 Bli. 57.

(8) 6 H. L. C. 823, 875.

an estate in tail male in possession to the plaintiff's father, the first taker, the words being "unto and to the use of every son of mine and his issue male in succession." The questions I have to ask myself are, first, whether that estate was given at all, and, if given, cut down by the subsequent limitations, or, secondly, whether the devise ought not to be read as a whole and the first sentence treated as a preliminary expression of the testator's intention as to the estates subsequently created by him in his real estate.

In *Montgomery v. Montgomery* (1) Sir Edward Sugden L.C. said: "The rule in *Shelley's Case* (2) forbids the words 'heirs of the body' to raise an estate by purchase in the heirs, where the ancestor takes a previous estate of freehold under the same instrument. Mr. Justice Blackstone, in delivering his opinion in *Perrin v. Blake* (3), justly observes, that this is a rule of a flexible nature; for if the intention of the testator be clearly and manifestly contrary to the legal import of the words, the technical rule of law shall give way to this plain intent of the testator. But every testator, when he uses the legal idiom, shall be supposed to use it in its legal meaning, unless he very plainly declares that he means to use it otherwise. The true question, he said, was, whether the testator had or had not plainly declared his intent that the heirs of the body should take an estate by purchase, entirely detached from, and unconnected with the estate of their ancestor." Then a little lower down he says: "The learned judge then proceeded to consider what evidence had been usually required to demonstrate such a devious intention; and his summary is referred to by Fearne in terms of admiration worthy of that great lawyer. They are"—and then he gives four headings, and the fourth, which is the one applicable to the present case, is this: "Where the testator has superadded fresh limitations and grafted other words of inheritance upon the heirs to whom he has given the estate, whereby it appears that those heirs were meant to be the root of a new inheritance—the stock of a new descent."

That passage is subject to Lord Macnaghten's criticism in *Van*

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(1) 3 J. & Lat. 47, 50.

(2) 1 Rep. 93b.

(3) (1772) Hargrave's Law Tracts, 489.

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Grutten v. Foxwell. (1) There Lord Herschell says: "It is a rule of law that where an estate is devised to the 'heirs' or 'heirs of the body' of a person to whom a prior estate of freehold has been given, the heirs take by descent, and not by purchase, and that an estate in fee simple or in fee tail is created in the ancestor. A testator can no more make such a devise and direct that it shall not have this operation than he can, in terms, create an estate in fee simple or an estate tail, and then direct that these estates shall not have the incidents which the law annexes to them. If words be superadded purporting to have that effect they must be treated as absolutely ineffectual. So, too, must words inconsistent with the possession of an estate tail or in fee simple by one to whom a life estate has been devised, with a subsequent limitation to his heirs, special or general. At the same time, if the words which are added, or, indeed, any provisions to be found in other parts of the will, shew that the expression 'heirs' or 'heirs of the body' was not intended to be used in the ordinary legal sense, but was intended to designate some individual person or particular class of persons, effect may be given to the intention of the testator thus expressed."

In the present case, therefore, if the testator had by the first portion of the devise actually given an estate in tail male to his eldest son the mere addition of an expression of intention that the estates so created should have incidents other than those attached to it by law would be ineffectual. On the other hand, even if the testator had by the first sentence apparently made a completed gift to his eldest son in tail male he could by the context have shown that the words "issue male" were intended to designate some particular person or particular class of persons. I do not think that was the case here because it is plain that the words "issue male" are used in their general and full sense; and I think that the real point I have to decide is not whether the gift is cut down, but whether, having regard to the whole of this sentence, there is in fact any gift at all to the eldest son in tail male contained in the first portion of this limitation.

In the same case Lord Macnaghten says (2): "The authority

(1) [1897] A. C. 662.

(2) [1897] A. C. 676.

of *Jesson v. Wright* (1) was restored, and its supremacy finally established in *Roddy v. Fitzgerald* (2), and the question now in every case must be whether the expression requiring exposition, be it 'heirs' or 'heirs of the body,' or any other expression which may have the like meaning, is used as the designation of a particular individual or a particular class of objects, or whether, on the other hand, it includes the whole line of succession capable of inheriting." Here there is no doubt that the words "issue male" are not used as a designation of any particular individual or any particular class of male issue, but include the whole line in succession capable of inheriting; but I regard the question in this case as not being that which was being discussed in *Van Grutten v. Foxwell* (3) at all, namely, whether having so limited an estate in tail male the testator has effectually or otherwise cut it down, but whether the effect of this limitation as a whole is not to show that these words are introductory words, not intended in themselves to give an estate to any person or persons, but to be merely introductory to the limitations which the rest of this complex sentence shows that the testator intended to effect in his property.

Dealing with Sir Edward Sugden's comment upon *Perrin v. Blake* (4) Lord Macnaghten said (5): "Lastly, I cannot think that the passages which Sir Edward Sugden collected from the argument of Blackstone J. in *Perrin v. Blake* (4), and pieced together in his judgment in *Montgomery v. Montgomery* (6), convey an accurate representation of the meaning of that learned judge. Undoubtedly Blackstone J. refers to the rule in *Shelley's Case* (7) as a rule of a flexible nature. But he did not, I think, mean that the rule as we understand it, and as it was understood in *Roddy v. Fitzgerald* (8), was otherwise than imperative. You may have a gift of an estate of freehold to the ancestor, and in the same will a gift to the heirs, so that the case is within the letter of the rule, and yet the rule will not apply, because the legal meaning of the word 'heirs' has to yield to an explanatory

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(1) 2 Bli. 1.

(2) 6 H. L. C. 823.

(3) [1897] A. C. 658.

(4) Hargrave's Law Tracts, 489,

(5) [1897] A. C. 674.

(6) 3 J. & Lat. 47.

(7) 1 Rep. 93b.

(8) 6 H. L. C. 823, 881.

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context. It seems to me that all Blackstone J. meant was what Lord Alvanley expressed when he said: 'The rule was not so rigid as to preclude the testator himself from explaining the words used': *Poole v. Poole*. (1) I think this would have been tolerably clear even from the extracts given in *Montgomery v. Montgomery* (2) if an important sentence had not been unfortunately omitted. 'I am far from maintaining,' observes Blackstone J., in the sentence to which I refer, 'that by a devise to a man's heirs or the heirs of his body they shall never take as purchasers in any case. But I have never observed it to be allowed except in one of these four situations.' And then follow the four cases which Sir E. Sugden summarises, and refers to," and so on.

These cases are substantially confined to the rule in *Shelley's Case* (3), but in *Fetherston v. Fetherston* (4), which was not so limited, the head-note is as follows: "Where by plain words, in themselves liable to no doubt, an estate tail is given in a will, it cannot be cut down to a life estate, unless there are other words which plainly show the testator to have used the former as words of purchase, contrary to their ordinary sense; or unless in the other provisions of the will there should be a clearly expressed intention inconsistent with the giving of an estate tail, and which intention can only be fulfilled by sacrificing the particular provision, and regarding the expressions as words of purchase," and in that case it was held that under a devise to "W. F. and his heirs male, according to their seniority and their respectively attaining twenty-one, the elder son surviving of the said W. F. and the heirs male of his body to be preferred to the second or younger son, and in case of failure of issue male of W. F. surviving him, or dying without lawful issue male attaining twenty-one, then over," an estate tail was validly devised to W. F. Lord Brougham said (5): "I take the principle of construction as consonant to reason, and established by authority, to be this, that where by plain words, in themselves liable to no doubt, an estate tail is given, you are not to allow such estate to be altered

(1) (1804) 3 Bos. & P. 620.

(3) 1 Rep. 93b.

(2) 3 J. & Lat. 47.

(4) 3 Cl. & F. 67,

. (5) 3 Cl. & F. 75,

and cut down to a life estate unless there are other words which plainly show the testator to have used the former as words of purchase, contrary to their natural and ordinary sense,"—that is not the case here—"or unless in the rest of the provisions there be some plain indication of a general intent inconsistent with an estate tail being given by the words in question"—that, I think, is the case under the present will. Then he said (1): "Such indeed is the force of those words—such their clear tendency to give an estate tail, that we may almost lay it down as a rule that no other provision of a will is sufficiently strong to overrule this tendency and make them words of purchase, which does not fall within the first head of exception, and show that the testator's meaning was other than what at first sight it appears to be."

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Those are the authorities to which I have been referred, and I would observe in conclusion, first, that this is not a question of whether the rule in *Shelley's Case* (2) applies at all, and, secondly, that it is not a question of whether the words "issue male" are used as denoting a special or particular class of male issue, or whether they are used in the first portion of the sentence as words of purchase or words of limitation. The real point, as I understand this case, is whether this testator has not by a short and compendious statement intended to make a settlement by way of successive limitation in his real estate so that his eldest son shall take for life and his eldest grandson, if begotten in his lifetime, shall also take for life, with remainders in tail male, but that his eldest grandson, if begotten after his death, shall take an estate in tail male. I think that is really the true effect of this will, and I think it ought to be read as follows: "I devise my real estate unto and to the use of every son of mine and his issue male in succession by way of the following limitations, namely, so that every elder son and his issue male be preferred to every younger son and his issue male and that my grandsons respectively with their respective issue male take in succession according to their respective seniorities and so that every such son and every such grandson who shall be begotten in my lifetime take an estate for his life without impeachment of waste with remainder to his first and every

(1) 3 Cl. & F. 77.

(2) 1 Rep. 93b.

C. A. subsequent son successively according to seniority in tail male
 1914 and that every such grandson who shall be begotten after my
 LAWRENCE death take an estate in tail male.”
 (LORD), Giving the best attention I can to the above authorities, and to
In re. the very able arguments which have been addressed to me, I
 LAWRENCE think that is the proper construction of this will, and I so hold.
v.
 LAWRENCE. The result is that the plaintiff's father, the testator's eldest
 Astbury J. son, took an estate for life, and the plaintiff, being a grandson
 begotten in the testator's lifetime, takes for life only.

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C. A. The plaintiff appealed. The appeal came on for hearing on
 October 30, 1914.

Maugham, K.C., and *Wilfrid A. Greene*, for the appellant. It has been held by Astbury J. in the appellant's favour that the technical words “issue male” include the whole stock of inheritable descent and are not limited to sons or grandsons. The devise therefore “unto and to the use of every son of mine and his issue male in succession” conferred an estate in tail male upon the appellant's father, and the additional words do not affect the previous devise in any way. The words commencing with “so that” are merely explanatory and show how the estate tail is to go. They do not have the effect of a cutting down proviso such as may be found in the conveyancing precedents. The appellant takes an estate in tail male by descent and not by purchase.

Alternatively, having regard to the words “and so that” etc., the appellant takes an estate in tail male in remainder: *In re Simcoe* (1); *Van Grutten v. Foxwell* (2); *Roddy v. Fitzgerald*. (3) The testator cannot create an estate tail and then say that it shall not have the ordinary incidents of such an estate. His intention is of no consequence: *Douglas v. Congreve* (4); it cannot alter the effect of the technical words of the rule in *Shelley's Case*. (5) The opening words of the devise cannot be explained

(1) [1913] 1 Ch. 552.

(3) 6 H. L. C. 823.

(2) [1897] A. C. 658.

(4) (1838) 1 Beav. 59,

(5) 1 Rep. 93b,

as merely introductory; such a suggestion has not been accepted in any of the numerous cases on this subject. Restrictions upon the estate are immaterial: *Robinson v. Robinson* (1); *Roe v. Bedford* (2); *Van Grutten v. Foxwell* (3); *Jordan v. Adams*. (4) The testator has used words which have the effect of creating an estate tail and that estate cannot be cut down to a life estate. That the clause in question is taken from Hayes and Jarman's Concise Forms of Wills, 13th ed. p. 471, and is well known is immaterial.

Hon. F. Russell, K.C., and *E. Beaumont*, for the testator's younger sons. The rule in *Shelley's Case* (5) has no application to this will. There is a direct gift in plain terms and nothing which calls for the introduction of the rule. The appellant admits that his contention is contrary to the intention of the testator. We accept the law as he states it, namely, that if the testator has given an estate tail he cannot subsequently cut it down; but it is not right to stop in the middle of the clause and refuse to look at the rest of it. The first sentence does not give anything to the eldest son; the words "in succession" do not necessarily mean that the eldest son comes first, although they do mean "one after the other." The testator explains afterwards the order in which they are to take; which shows that he did not think the words "in succession" were sufficient. The words which follow "so that" are part of the gift. This clause is taken from Hayes and Jarman's Concise Forms of Wills and has been in use for many years for devises in strict settlement, and the Court will be slow to say that it is wrong. It is one entire gift and not a gift cut down, so the authorities on that point do not apply. A similar form is to be found in Davidson's Precedents, 3rd ed. vol. iv. p. 386, form 21. A testator may show by the context that he has used the word "issue" in a limited or restricted sense of his own: *Van Grutten v. Foxwell* (6); and there is abundant context here to show that he has done so.

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(1) (1750) 2 Ves. Sen. 225; (1758)
3 Bro. P. C. 180.

(2) (1783) 1 Bro. C. C. 313; (1815)
4 M. & S. 362.

(3) [1897] A. C. 658.

(4) 9 C. B. (N.S.) 483.

(5) 1 Rep. 93b.

(6) [1897] A. C. 658, 685.

C. A. *Dighton Pollock*, for the plaintiff's infant son, supported the
 1914 same contention. He referred to *Lees v. Mosley*. (1)
 LAWRENCE *Maugham, K.C.*, in reply, referred to *Hawkins on Wills*,
 (LORD), 2nd ed. p. 226, and *Fetherston v. Fetherston*. (2)
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Cur. adv. vult.

Nov. 21. LORD COZENS-HARDY M.R. The first Lord Lawrence, whose will is in question in this appeal, died in June, 1879. His eldest son, the second Lord Lawrence, died in August, 1913, leaving a son, the third Lord Lawrence, who was born in 1878, in the lifetime of the testator. The testator devised his real estate to trustees "unto and to the use of every son of mine and his issue male in succession so that every elder son and his issue male be preferred to every younger son and his issue male and that my grandsons respectively with their respective issue male take in succession according to their respective seniorities and so that every such son and every such grandson who shall be begotten in my lifetime take an estate for his life without impeachment of waste with remainder to his first and every subsequent son successively according to seniority in tail male and that every such grandson who shall be begotten after my death take an estate in tail male" with remainder, over.

The third Lord Lawrence, the plaintiff, contends that his father was tenant in tail male, and that he is now tenant in tail male by descent, of the devised estates, and not only tenant for life, as *Astbury J.* has held. Lengthy and learned arguments were addressed to us upon the rule in *Shelley's Case* (3) and the numerous authorities in all Courts upon that rule. But in my opinion the rule in *Shelley's Case* (3) has no application to the present will. There is no life estate to the second Lord with remainder to his issue in tail male. Nor is there any attempt to create an estate tail, and then to deprive it of its legal incidents. The plain intention of the testator was that his eldest son the second Lord should take an estate for life, and that the plaintiff,

(1) (1835) 1 Y. & C. Ex. 589.

(2) 3 Cl. & F. 67.

(3) 1 Rep. 93b.

who was born in the testator's lifetime, should on his father's death take an estate for life, with remainder to the plaintiff's first and other sons in tail male. The rule in *Shelley's Case* (1) is no doubt a rule of law quite irrespective of the testator's wishes. It would, I think, be wrong to introduce that rule for the purpose of defeating the expressed intention of the testator.

I should add that the form used by the testator is taken from Hayes and Jarman's Concise Forms of Wills, a work of high authority, where it is used for the purpose of effecting a strict settlement. It is not the modern form, but I think it is effective.

For these reasons I think Astbury J.'s decision was correct, and that the appeal must be dismissed.

KENNEDY L.J. The question to be decided on the originating summons in this case is whether, according to the true construction of the will of the first Lord Lawrence, dated March 11, 1872, his grandson, the present Lord Lawrence, is tenant in tail of certain real property devised by that will, or is entitled to an estate for life only, as Astbury J. has held him to be. The devise, upon the interpretation of which the answer to the question depends, is, so far as it is material, in the following terms: [His Lordship read it.]

The present Lord Lawrence is a grandson of the testator, born in 1878, during the lifetime of the testator. It is contended on his behalf that according to the right construction of this devise he takes an estate in tail male, and reliance is placed upon the application of the rule in *Shelley's Case* (1) to this devise. There is no doubt as to the law. Lord Herschell, in the well-known case of *Van Grutten v. Foxwell* (2), has stated it in very clear and definite terms: "It is a rule of law that where an estate is devised to the 'heirs' or 'heirs of the body' of a person to whom a prior estate of freehold has been given, the heirs take by descent, and not by purchase, and that an estate in fee simple or in fee tail is created in the ancestor. A testator can no more make such a devise and direct that it shall not have this operation than he can, in terms, create an estate in fee simple or

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(2) [1897] A. C. 658, 662, 663.

C. A. an estate tail, and then direct that these estates shall not have
 1914 the incidents which the law annexes to them. If words be
 LAWRENCE superadded purporting to have that effect they must be treated as
 (LORD), absolutely ineffectual. So, too, must words inconsistent with the
In re. possession of an estate tail or in fee simple by one to whom a life
 LAWRENCE estate has been devised, with a subsequent limitation to his
v. heirs, special or general." There is a similar pronouncement of
 LAWRENCE the law in rather fuller terms delivered by Lord Davey in the
 Kennedy L.J. same case at pp. 684 and 685 of the report. Lord Macnaghten,
 in the same case (p. 668), pointed out that "It is hardly necessary
 to observe that any expression which imports the whole succession
 of inheritable blood has the same effect in bringing the rule into
 operation as the word 'heirs.'" And the same is true of the
 word "issue," as Lord Cranworth stated in *Roddy v. Fitzgerald*. (1)
 And it is now firmly established by Swinfen Eady L.J. (then
 Swinfen Eady J.) in *In re Simcoe* (2) that in devising real estate
 "issue" is prima facie a word of limitation and equivalent to
 "heirs of the body." It appears to me to be needless for the
 purposes of this judgment to discuss the numerous cases cited
 or referred to by the learned counsel for the appellant in the
 course of his argument, in which the rule of law has been
 applied, as, for example, in *Roe v. Bedford* (3), or the numerous
 instances of its application collected in the judgment of
 Cockburn C.J. in *Jordan v. Adams*. (4) One of the latest,
 if not the latest, applications of the rule is to be found
 in the decision I have just referred to of *In re Simcoe* (2)
 in the year 1913. It is, I think, equally needless to refer to
 the judicial decisions which have illustrated the qualification
 of the rule, if qualification it can be termed, that if words
 which are added to the devise, or indeed any provisions to
 be found in other parts of the will, show that the expression
 "heirs" or "heirs of the body" or an equivalent expression
 is not intended to be used in the ordinary legal sense, but
 is intended to designate some individual person or particular
 class of persons, effect may be given to the intention of the
 testator thus expressed. (See per Cockburn C.J. in *Jordan v.*

(1) 6 H. L. C. 875.

(3) 4 M. & S. 362.

(2) [1913] 1 Ch. 552, 557.

(4) 9 C. B. (N.S.) 483, 497.

Adams (1), per Lord Brougham in *Fetherston v. Fetherston* (2), and Lord Herschell in *Van Grutten v. Foxwell*. (3)) No consideration of that sort arises in the present case. The question is whether, if correctly construed, the devise gives room for the application of the rule.

The appellant asks the Court to read it as containing in its earlier part language which constitutes a devise of an estate in tail male, and as containing in its later part, beginning with the words "so that," an attempt to direct that, notwithstanding this limitation, such estate is to be cut down to a life estate, and so to deprive the estate previously given of the incidents which the law annexes to it. This, according to the rule, the law will not permit, and, if the construction of the devise for which the appellant contends is the right construction, he will be entitled to the estate in tail which he claims. The respondent, on the other hand, contends that the sentence containing the devise is not to be split up in this way; that if the passage is properly and fairly construed as a whole, its terms are not such as to admit the application of the rule in *Shelley's Case* (4), and that its legal effect, although one which, with all due deference to the authority of a text-book of high repute referred to in the argument before us, I venture to think capable of improvement, is (as appears to me to have been plainly the testator's intention) to create a settlement by way of successive limitation in the real property which he has specified, so that his eldest son shall take an estate for life, and his eldest grandson, if born in the testator's lifetime, shall also take an estate for life, with remainders in tail male as specified in the concluding words of the devise. This is the view which commended itself to the learned judge in the Court below, and I think that his paraphrase of this part of the will is correct: "I devise my real estate unto and to the use of every son of mine and his issue male in succession by way of the following limitations, namely, so that every elder son and his issue male be preferred to every younger son and his issue male, and that my grandsons respectively and their issue male take in succession according to their respective seniorities, and so that

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(1) 9 C. B. (N.S.) 483, 501.

(2) 3 Cl. & F. 67.

(3) [1897] A. C. 663.

(4) 1 Rep. 93b.

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every such son, and every such grandson who shall be begotten in my lifetime, take an estate for life without impeachment of waste, with remainder to his first and every subsequent son successively in tail male, and that every such grandson who is begotten after my death take an estate in tail male with remainder to the use of my said trustees."

I hold that the learned judge has rightly declared that the appellant is entitled to a life estate only.

SWINFEN EADY L.J. The question arising upon this appeal is whether the plaintiff, who is the third Lord Lawrence, is tenant for life or tenant in tail under the will of the first Lord Lawrence. Astbury J. decided that he was tenant for life, and the plaintiff appeals, contending that he is tenant in tail.

The plaintiff is a grandson of the testator, born on March 29, 1878, and therefore in the lifetime of the testator, who died on June 27, 1879.

The will has already been read so far as material. If the will had stopped at the word "succession" in the passage "I devise my freehold lands . . . unto and to the use of every son of mine and his issue male in succession," and had contained only that devise, the second Lord Lawrence would have taken an immediate estate tail, not by virtue of the rule in *Shelley's Case* (1), but because the words used would have been appropriate to pass an estate tail; and not having disentailed, the third Lord Lawrence would now have been entitled as tenant in tail by descent. The will did not, however, stop at the word "succession." To stop there would be to stop at the end of the introductory words and before the testator had completed the terms of the devise. The subsequent words are all part and parcel of the devise itself, and show that every son, and every grandson begotten in the testator's lifetime was to take only an estate for life, without impeachment of waste, with remainder to his first and every other son in tail male.

If the whole clause of devise contained in the will is to be read and construed, it is clear that the testator intended to devise his real estate in strict settlement; sons and grandsons begotten in

(1) 1 Rep. 93b.

his lifetime taking only an estate for life, remainder to their first and other sons in tail. This indeed was scarcely disputed. It was contended, however, that the earlier words of the devise brought the case within the rule in *Shelley's Case* (1), a rule of law operating irrespective of the intention of a testator and frequently defeating the intention, but that nevertheless the Court must give effect to it. The answer is that the rule in *Shelley's Case* (1) has no application to this will. There is no gift to a son of an estate of freehold, with an estate limited by way of remainder to his issue male. Nor is there any gift of an estate tail, followed by a direction that the ordinary incidents of an estate tail shall not apply. The words which follow the devise "to the use of every son of mine and his issue male in succession" show clearly that the limitation must be read as a whole and those words treated as a preliminary expression of the testator's intention as to the interest subsequently given by him in his real estate. The testator has in the same devise shown the sense in which he has used the words "issue male"; he has expressly said that grandsons begotten in his lifetime are to take for life only, and that by other issue male he means first and other sons.

It is quite open to a testator to show that he has not used technical words in their appropriate sense if he also clearly shows the sense in which he did use them, and that is what the testator has done in the present case. The form used by the testator is taken from Hayes and Jarman's Concise Forms of Wills, which is now in its thirteenth edition, and the form is quite appropriate for the purpose of constituting a devise to uses in strict settlement.

I am of opinion that the careful judgment of Astbury J. as to the true construction of the will was right in law, and that this appeal should be dismissed.

Solicitors: *Dunderdale, Dehn & Co.; Ranken Ford, Ford & Chester.*

(1) 1 Rep. 93b.

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July 22, 31.

In re EARL OF CALEDON.ALMANDER *v.* EARL OF CALEDON.

[1914 C. 1583.]

Will—Construction—Bequests of Chattels—Wife for Life—“Person who under this my will shall at her death become entitled to the possession” of Realty—Persona designata.

Where a testator bequeathed chattels, after giving a life interest to his wife, to the person who under his will should at her death become entitled to the possession of a mansion which he devised to his wife for life with remainder to his first and other sons in tail male, and the wife and eldest son disentailed and resettled to such uses as they should appoint and in default to the original uses:—

Held, that the bequest of chattels after the death of the wife was an ordinary contingent gift to a person who should then answer a certain description, namely, who under the will shall have become entitled to the possession of the mansion; and that, during the life of the wife, it was impossible to say who that person would be, and the eldest son had not become absolutely entitled to them.

SUMMONS.

By his will, dated August 10, 1896, the fourth Earl of Caledon gave to his wife “for her use during her life my diamonds and other jewelry and so much of my furniture pictures plate linen china ornaments of the person or house and other household garden and farming implements and effects which at the time of my death may be elsewhere than at Caledon aforesaid as she may select and from and after her death I give the same or such of them as shall not have been worn out to the person who under this my will shall at her death become entitled to the possession of my Tyttenhanger mansion hereinafter referred to such person to take the same absolutely for his or her own benefit.”

The testator gave the Tyttenhanger estate, including the mansion, to his wife for life, with remainder to his first and other sons successively in tail male.

He died on April 27, 1898, leaving his wife and eldest son (fifth Earl) surviving.

His wife selected all the chattels.

She and the fifth Earl executed a disentailing deed of the Tyttenhanger estate and resettled it to such uses as they should jointly appoint, and in default of appointment to the uses limited by the will.

No appointment had been made.

The executors and trustees of the will took out this summons asking whether the fifth Earl "is now absolutely entitled in reversion expectant on the death of" his mother to such of the chattels as should not then have been worn out, or whether they would then belong to the person who then became entitled under the will to the possession of the Tyttenhanger estate.

G. R. Northcote, for the plaintiffs.

Harold Burrows, for the fifth Earl. The present Earl as the person who first takes a vested interest, whether in possession, reversion, or remainder, in the Tyttenhanger estate, subject to his mother's life estate, takes the chattels absolutely: *Hogg v. Jones* (1); *In re Cresswell* (2); *In re Trevanion* (3); *In re Parker*. (4) That is in accordance with the ordinary rule, which, however, may be rebutted, but can only be rebutted by something very clear and definite in the will. Here there is nothing to rebut it. The main object of the testator as shown by the whole will was that the chattels should go with the real estate; his wife to have the use and enjoyment of such of them as she chose for her life. The estate in tail male in the Tyttenhanger estate, subject to her life interest, is vested in the fifth Earl, without any defeasance clause in the will. *Hogg v. Jones* (1) would have been decided differently if the interest of the first tenant in tail who there came into existence had not been liable to be defeated by the birth of a tenant in tail prior in title. Subject to the prior life interest, the fifth Earl is "entitled to the possession." The testator uses the word "possession" simply, he does not say "actual possession." The word can be construed as meaning vested in contradistinction to contingent interest; it refers to interest, not to actual possession. The fifth Earl, therefore, is now, subject to his mother's interest, absolutely entitled to the chattels.

(1) (1863) 32 Beav. 45.

(2) (1883) 24 Ch. D. 102.

(3) [1910] 2 Ch. 538.

(4) [1910] 1 Ch. 581.

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JOYCE J. *J. Rolt*, for persons entitled under the will, in remainder expectant on the death of the fifth Earl without issue, to the Tyttenhanger estate. The question is merely one of construction of this will. It has nothing to do with any question of law as to chattels being settled to go with real estate, or of heirlooms. It is simply a matter of ascertaining the person who at a particular time in the future shall answer to a particular description. *Potts v. Potts* (1) is as near to this case as any can be. It is really indistinguishable: *Cox v. Sutton*. (2)

Hogg v. Jones (3) and earlier cases beginning with *Foley v. Burnell* (4) are cases of heirlooms or of chattels going by reference to settlement of real estate. That element is entirely wanting here, and those cases have no applicability to the present.

The fact that a disentailing deed has been executed does not affect the question.

H. Burrows in reply.

Cur. adv. vult.

July 31. JOYCE J. [His Lordship read the bequest set out within inverted commas above, and continued:] I remark that the bequest is to the person who "shall at her death become entitled to the possession," not the actual possession. I do not say it does not mean the same thing, but the expression is "possession" and not "actual possession." There is no mention of heirlooms in this will except in connection with some other chattels in another part of the will where the testator speaks of heirlooms settled by the will of his late father. Those are at Caledon; the word "heirlooms" is not used in connection with these chattels. I ought to have mentioned that the widow of the testator, the Countess, selected the whole of these chattels, and the question submitted to the Court is who is entitled to these chattels now, or who will be entitled to them when the Countess dies? As I have said, the word "heirlooms" is not mentioned in connection with these chattels, nor are there any

(1) (1848) 1 H. L. C. 671.

(2) (1856) 25 L. J. (Ch.) 845.

(3) 32 Beav. 45.

(4) (1783) 1 Bro. C. C. 274; (1785)

4 Bro. P. C. 319.

of the ordinary phrases or limitations or words used for the purpose of annexing chattels to real estate; I mean no one of the modes has been adopted which are specified in particular in *Vaizey on Settlements* at p. 1333. There is no expression of an intention that these chattels and the Tyttenhanger estate shall go together beyond a simple gift after the death of the Countess to the person who under the testator's will shall at her death become entitled to the possession of the Tyttenhanger estate. That is an estate which belonged, I think, to the testator in fee and which, by a subsequent part of the will, he gave to his wife for life and, subject thereto, to the present Earl, his eldest son, in tail male. The present Earl who claims is the eldest son of the testator and the first tenant in tail under his will of the Tyttenhanger estate. There has been a disentailing deed executed, the effect of which is stated—I have not seen the deed, but no doubt it is sufficiently stated—in an affidavit. There appears to have been a disentailing assurance executed by both the Earl and the Countess, the result of which, together with some other deed as I understand, is that the Tyttenhanger estate is now settled to such uses as the Countess and the present Earl shall jointly appoint, and in default of such appointment to the old uses under which the present Earl is tenant in tail in remainder after the Countess. He now claims to be absolutely entitled to the chattels in reversion or remainder subject to the life interest of the Countess, and I suppose, though I do not think it is stated in the summons, subject to any exercise of that joint power of appointment by the Countess and himself.

It is possible that the present Earl may die during the life of the Countess leaving a son who would succeed as tenant in tail in remainder and, in the ordinary course of things, come into possession upon his grandmother's death. I think I am right in saying that with the exception of this contingent gift, if it be a contingent gift, of these chattels there is no other disposition of them in this will, excepting of course the gift in the meantime to the widow, the mother of the Earl, for her life.

On one side, *Hogg v. Jones* (1) was insisted upon by Mr.

(1) 32 Beav. 45.

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(EARL).

JOYCE J. Burrows, and, upon the other, Mr. Rolt insisted upon *Potts v.*
 1914 *Potts*. (1) I am not quite sure that either of these authorities
 CALEDON has anything to do with the case in its present position, though
 (EARL), it is possible one of them may have something to do with it after
In re. the death of the Countess.

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 (EARL).

Upon consideration I am of opinion that this is simply an ordinary contingent bequest of chattels (it might just as well be a sum of 1000*l.* sterling) after the life of the Countess to the person who under the limitations of the will shall at her death become entitled to the possession of the Tyttenhanger mansion. It is to the person who shall then answer a certain description or possess a certain qualification, that is, of becoming under the will entitled to the possession of the Tyttenhanger mansion upon her death. There is no other reference of any sort or kind to the connection of these chattels with any title to the real estate, and it is quite impossible for me to say whether the present Earl will when the time arrives, that is to say, the decease of the Countess, become entitled to the possession under the will of the Tyttenhanger mansion, nor is it at present known in the least who will then become entitled under this bequest. The will does not give, in my opinion, nor was it the intention of the testator to give, these chattels to any tenant in tail or other person who does not live to acquire possession under the limitations. In my opinion the present Earl is not at present absolutely entitled to these chattels.

Solicitors : *Field, Roscoe & Co.*; *Rooper & Whately*.

(1) 1 H. L. C. 671.

A. L.

In re GREENSLADE.
GREENSLADE *v.* McCOWEN.

[1914 G. 1569.]

EVE J.

1914

Nov. 13, 18.

Will—Appointment—Power—Maintenance of Infants—Delegation of Power—Invalidity.

By his will made in 1889 E. A. G. devised and bequeathed his residuary real and personal estate to trustees upon trust as to a particular share thereof to pay the income to his daughter for life, with power to her to appoint the income to her husband, and after her decease, and subject to any appointment to her husband, to hold the said share and the income in trust for her children, or any of their issue in such manner as she should by deed or will appoint. The will contained an express provision enabling the trustees to apply any part of the annual income of the share to which an infant might be entitled towards the maintenance, education, or benefit of such infant, but by a codicil to his will the testator declared that the powers of maintenance should only apply to income to which the infant was, or if of full age would be, entitled. The daughter married and had three children, all infants, and respondents to the summons. By her will, made in 1908, after appointing a defeasible life interest in the settled share to her husband, she appointed the said share, and the income thereof, to all her children who should attain twenty-five before the expiration of twenty-one years from her death, or should be living at the expiration of such period without having attained twenty-five, with a proviso under which possible grandchildren might become entitled under the appointment to an interest in their parent's share, and she "empowered the trustees of the settled share" to apply the income of the expectant share of any child or grandchild for or towards his or her maintenance, education, or benefit. The testatrix and her husband having both died, upon a summons taken out by the trustees of the will of E. A. G. asking whether they had a discretionary power under either of the wills to apply the income of the shares to which the infant defendants were contingently entitled, for their maintenance, education, and benefit:—

Held, that the power contained in the appointment by the mother's will was an attempt to delegate to the trustees a personal discretion exercisable by the donee, and therefore wholly inoperative.

Held, further, that the power under the grandfather's will was also inapplicable to this appointed share.

ADJOURNED SUMMONS.

By his will, dated July 24, 1889, Edward Acraman Greenslade, after appointing executors and trustees, and making sundry specific and pecuniary bequests, devised and bequeathed his

EVE J. residuary real and personal estate to his trustees upon trust for
1914 sale and investment, and to stand possessed of the residuary trust
GREENSLADE, funds upon trust, as to five equal sixty-fourth parts thereof, for
In re. his daughter, Anne Lunham Greenslade, if she should attain
GREENSLADE twenty-one years; and by clause 11 of his said will the testator
v. directed that his trustees should retain the said share upon trust
McCOWEN. to pay the income thereof to his daughter for life, for her separate
 use, without power of anticipation, but with power nevertheless
 for her to appoint by deed or will that after her decease the whole
 or any part of such income should be paid to any husband who
 might survive her during his life, or any less period, and after
 her decease, and subject to any appointment which might be
 made to her husband, in trust for her children, or any of them,
 or any of their issue, in such shares (if more than one) and in
 such manner as she should by any deed or deeds, or by her will,
 appoint, and in default for such of her children as being males
 should attain twenty-one or being females should attain that
 age or marry.

Clause 12 of the will provided as follows: "I declare that my trustees may apply the whole, or such part or parts as they shall think fit, of the annual income of the share of and in the residuary trust funds, to the benefit of which, or of the income of which, any infant shall be entitled in expectancy under the trusts hereinbefore declared, for or towards the maintenance, education, or benefit of such infant, either directly, or by paying the same for such purpose to his or her guardians or guardian, without seeing to the application thereof."

By clause 3 of a codicil to his will, dated August 11, 1892, the testator declared that "the powers of maintenance contained in clause 12 of my said will shall only apply to income to which the infant is, or if of full age would be, entitled."

The testator died on May 13, 1894, and his will and codicil, together with another codicil not material to be stated, were duly proved. The plaintiffs were the present trustees of the said will and codicils.

In 1895 the daughter was married to Mr. Victor Albert Hill McCowen, and by her will, dated January 1, 1908, after appointing her husband and two others executors and trustees and giving

a defeasible life interest in her settled share of her father's estate to her husband, she appointed this settled share and the income thereof to all her children, or any her child, who should attain the age of twenty-five years before the expiration of twenty-one years from her death, or should be living at the expiration of such period of twenty-one years without having attained the age of twenty-five years, and if more than one in equal shares, with a proviso that if any child should die in her lifetime (which event did not happen) or should die before the expiration of twenty-one years from her death under the age of twenty-five years, or leaving a child or children who should be living at the expiration of such twenty-one years or should previously attain the age of twenty-five years, such child or children should take, and if more than one equally between them, the share which his, her, or their parent would have taken under that appointment, if such parent had been living at the expiration of such period of twenty-one years. The testatrix then proceeded: "And I empower the said trustees," (those were the trustees of the settled share) "subject and without prejudice to the life interest hereby appointed in favour of my said husband, to apply the income of the expectant share of any child or grandchild of mine for or towards his or her maintenance, education, or benefit, or if he or she shall have attained the age of twenty-one years, to pay such income to him or her until his or her share shall vest and fall into possession."

The testatrix died on February 23, 1908, and her husband on September 8, 1910. The income was badly needed for the maintenance and education of the three respondents the children of the marriage, aged respectively eighteen, sixteen, and six years.

The trustees of the will of E. A. Greenslade had accumulated on deposit the income of the McCowen share, and such accumulations amounted to 727*l.* 13*s.* 7*d.* They now took out an originating summons asking (1.) whether, upon the true construction of the said will and codicils, and of the will of A. L. McCowen, and in the events that had happened, the plaintiffs, as such trustees, had a discretionary power either (a) under the power contained in clause 12 of the will of E. A. Greenslade as modified by clause 3 of the first codicil, or (b) under the

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EVE J. power purporting to be given by the will of A. L. McCowen, or (c) under the statutory power contained in s. 43 of the Conveyancing Act, 1881, or otherwise, to apply all or any part of the future income of the shares to which the three infant defendants were respectively contingently entitled in the residuary trust funds held in trust for Mrs. McCowen and her children and issue, and the accumulations of past income, for the maintenance, education, and benefit of the infant defendants respectively.

(4.) In case that question were answered in the negative, that the plaintiffs might be authorized by the Court to apply all or some part of the income of the infant defendants' contingent shares for their maintenance, education, and benefit respectively, as from September 8, 1910, and that a scheme might be approved for that purpose.

J. M. Gover, for the trustees of the will of E. A. Greenslade. On the construction of the appointment made by the will of Mrs. McCowen there is a delegation to the trustees of the special power of appointment given to her by the will of her father. This is objectionable, and nullifies the appointment. A discretion cannot be delegated: *Farwell on Powers*, 2nd ed. pp. 288, 289; *White v. Grane* (1); *Chester v. Chadwick* (2); *Lloyd v. Lloyd*. (3) The power to apply income for maintenance and education usually given to trustees will not, in general, apply to an appointed share. In some settlements the clauses for maintenance and advancement are expressly made to extend to appointed shares where there is no appointment to the contrary: *Davidson's Precedents*, 3rd ed. vol. iii. pt. i. pp. 159, 160; *Vaisey on Settlements*, vol. ii. p. 1217; *Hood and Challis' Conveyancing, Settled Land and Trustee Acts*, 7th ed. p. 127.

Here the ample power contained in the grandfather's will was cut down by the codicil to his will, and is inapplicable to the present circumstances. The statutory power to trustees of applying for maintenance under s. 43 of the Conveyancing Act does not apply to the present case.

(1) (1854) 18 Beav. 571.

(2) (1842) 13 Sim. 102.

(3) (1858) 26 Beav. 96.

J. G. Wood, for the three infant defendants. This is not delegation, and there is no distinct authority in point. The three cases referred to in *Farwell on Powers* do not really deal expressly with the point of delegation, and neither the arguments, nor the grounds for the decision in *Lloyd v. Lloyd* (1), are stated. This is a power in the nature of a trust, and it has been exercised in the most beneficial way for the children. It is merely an acceleration which is effected, and it would be carrying the doctrine as to delegation too far to nullify this appointment. But if the Court should hold the appointment to be bad on the ground of delegation, then the power to apply income for maintenance under the grandfather's will and codicil becomes available.

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J. M. Gover in reply.

Cur. adv. vult.

Nov. 18. EVE J. The object of this summons is to ascertain whether the income of certain trust funds to which the respondents, who are all infants, are contingently entitled can be made available for their maintenance, education, and benefit. The funds in question represent the share of their late mother of and in the residuary estate of her father, Edward Acraman Greenslade, who died on May 13, 1894. [His Lordship then stated the facts substantially as set out above, and continued:]

The case is not one to which the statutory power contained in the 43rd section of the Conveyancing Act, 1881, is applicable, but it has been argued that the situation can be met either by the exercise of the powers contained in the mother's will, or, alternatively, of that contained in the grandfather's will. In answer to these arguments it is suggested on behalf of the trustees, first, that the power in the mother's will is invalid as being an attempted delegation by the donee of her power of appointment, and secondly, that the power in the grandfather's will does not extend to a share taken under an appointment, and, even if it does so extend, does not apply to the case of the respondents. In my opinion, the clause in the mother's will is not a trust, but a power, and it cannot, I think, be denied that

EVE J. the trustees, acting under that power, could divert income from
1914 objects of the power of appointment, who become ultimately
GREENSLADE, entitled in possession under the appointment, to other objects
In re. who, in the event, may never become entitled in possession. For
GREENSLADE example, if one of the respondents were to die under twenty-five
v. leaving a child who should be living on February 23, 1929, the
McCOWEN. whole share of the respondent so dying in the capital and income
of the appointed fund would be payable under the appointment
to the child, and to the extent to which the income had been paid
to or applied for the benefit of the respondent so dying the
appointment would fail of effect. It must, therefore, be admitted
that the power enables the trustees to modify in some respects
the appointment made by the donee, a result which is for practical
purposes tantamount to what would have arisen had the appoint-
ment of the income accruing prior to the period of distribution
been made in express terms to such of the objects as the trustees
might select. In other words, I think the power is, in effect, an
attempt to delegate to the trustees a personal discretion exercisable
by the donee.

The cases of *Chester v. Chadwick* (1), *White v. Grane* (2), and
Lloyd v. Lloyd (3) are relied on as authorities for the contention
that such an attempt is a nullity and void, and although I think
those cases, as reported, are open to the criticism that it is not
clear that any one of them was decided with reference to the delega-
tion of the power, it is, I think, impossible to suggest any other
satisfactory ground on which the decisions could have been based,
and they appear to have been accepted by all text-writers as
establishing the proposition referred to. I hold, therefore, that
the power of maintenance in the mother's will is wholly
inoperative.

The question remains, can resort be had to the power contained
in the grandfather's will? I do not think it can. Conveyancers
do not seem to be agreed upon the point, but many certainly
hold the opinion that the provisions for maintenance and
education and for advancement usually inserted in settlements
do not, in general, apply to an appointed share, such a share

(1) 13 Sim. 102.

(2) 18 Beav. 571.

(3) 26 Beav. 96.

being by the appointment and so far as it extends withdrawn from the general operation of the settlement (see Davidson's Precedents, 3rd ed. vol. iii. pt. i. p. 159, and Vaizey on Settlements, vol. ii. p. 1217); on the other hand, the order made in *White v. Grane* (1) might be cited in support of the contrary view. It is not, however, necessary for me to determine this point, as in the present case, even if the power of maintenance in the grandfather's will applies to appointed shares generally, it does not apply to this appointed share, because, by the codicil to his will, he declares that the power "shall only apply to income to which the infant is, or if of full age would be, entitled," and there is no income under this appointment falling within that definition. I regret, therefore, to say that I must answer the first question in the summons in the negative, but I am hopeful that possibly by some inexpensive scheme of insurance the difficulties in the way of making this income available for the respondents may be surmounted, and I accordingly adjourn the rest of the summons into chambers with that view.

Solicitors for all parties: *Carthew, Wheeler & Hancock, for Barry & Harris, Bristol.*

(1) 18 Beav. 571.

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In re MORRELL AND CHAPMAN'S CONTRACT.

1914

[1914 M. 1743.]

Nov. 20 ;
Dec. 2.

Vendor and Purchaser—Contract—Title—Settled Legacies charged on Freeholds and Leaseholds—Sale of Leasehold—Payment of Purchase Price to Trustee of Settled Legacies—Release of Property sold from the Charge—Doubtful Title.

A trustee mortgagee has power to release part of his security on receipt of the whole of the purchase-money produced thereby.

Where, therefore, trust legacies were charged by will upon freehold and leasehold properties, and the persons entitled to the property subject to the charge, one of them being also the trustee of the legacies, agreed to sell to a purchaser a leasehold house and premises forming part of the estate on the terms that the whole purchase-money of this leasehold should be received by the trustee of the legacies:—

Held, that the vendors could make a good title to the leasehold house and premises freed and discharged from the trust legacies.

ADJOURNED SUMMONS under the Vendor and Purchaser Act, 1874.

By his will, dated January 16, 1888, George Morrell, after bequeathing to his wife for her life a residential property called "The Oaks," of which he was the assignee for the residue of a term of ninety-nine years from June 24, 1853, bequeathed to George Medley Morrell and his brother, Arthur Robert Morrell, and one S. H. Holmes, two sums of 5000*l.* each to be held by them upon trusts in favour of the two daughters of the testator and their issue, and the testator charged all his freehold, copyhold, and leasehold estates primarily, and his residuary personal estate in the second place, with the payment of these two trust legacies and interest, and subject to the charges, legacies, devises, and bequests therein mentioned and to the payment of debts and funeral and testamentary expenses he gave, devised, and bequeathed all his real and personal estate (which included The Oaks) to G. M. Morrell and A. R. Morrell absolutely in equal shares as tenants in common.

By a codicil to his will the testator bequeathed the use and enjoyment of The Oaks to his daughter Edith Parisot (a widow) until she should marry again, and subject thereto the testator

gave and bequeathed The Oaks to G. M. Morrell and his brother A. R. Morrell in equal shares as tenants in common subject to the charges mentioned in his will, and the testator increased the two trust legacies to 10,000*l.* each.

The testator died in 1900, and S. H. Holmes disclaimed the trusts of the will and codicil in relation to the legacies of 10,000*l.* The testator's widow married again and died in 1913, and Edith Parisot married again, so that her reversionary interest in The Oaks determined

A. R. Morrell died on March 13, 1914, having by his will appointed G. M. Morrell and Charles Warwick Whitworth his executors.

The first two half-yearly instalments of the trust legacies of 10,000*l.* had been duly paid, and 16,000*l.* remained still due.

By a contract dated April 20, 1914, G. M. Morrell in his own right, and he and C. W. Whitworth as executors of A. R. Morrell, agreed to sell to the respondent John George Chapman The Oaks for the residue of the term of ninety-nine years at the price of 3000*l.* The purchaser took an objection to the title on the ground that, the balance of the two trust legacies of 10,000*l.* each being charged on the whole of the testator's freehold, copyhold, and leasehold estates, G. M. Morrell, as the sole remaining trustee of the two legacies, could not release The Oaks from that charge, although it was agreed that the whole of the purchase-money of 3000*l.* should be paid to G. M. Morrell as such trustee, and in part payment of the two sums of 10,000*l.* By his requisition the purchaser required to be satisfied that the settled legacies had been wholly discharged prior to completion. The vendors, being unable to comply with this requisition, took out an originating summons asking that it might be declared that, subject to the whole of the purchase-money payable under the contract being paid to the applicant, G. M. Morrell, as the sole trustee of the two trust legacies charged on (inter alia) the leasehold premises comprised in the contract, the said G. M. Morrell as to one undivided moiety, and G. M. Morrell and C. W. Whitworth as personal representatives of A. R. Morrell as to the other part, could make a good title to the said leasehold premises freed and discharged from the two trust legacies.

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A. Underhill, for the vendors. The question is whether, when trust legacies are charged upon leasehold property by will, the person who takes the property subject to the charge can, together with the trustee of the legacies, make a good title. I submit it is clear that a good title can be made where, as here, it is agreed that the whole of the purchase-money of the leasehold is to be received by one of the vendors who is also the sole trustee of the settled legacies; and that being so, he can release the leasehold from the charge. The precise point has never been the subject of judicial decision, but the principle cannot, I submit, be controverted. It is a matter of frequent occurrence in conveyancing: Davidson's *Precedents in Conveyancing*, 4th ed. vol. ii. pt. ii. p. 285. Lewin on *Trusts* and Dart on *Vendors and Purchasers* treat it in the same way; and the principle is established in *Corser v. Cartwright*. (1) The case of *In re Rebbeck* (2) may be cited on the other side, but that case only comes to this, that when one of several executors is also a devisee of real estate, he cannot sell for the purpose of paying a legacy. In the present case there is a trust to pay to the surviving acting trustee.

Clayton, K.C., and *G. R. Northcote*, for the purchaser. There are three objections to the title in the present case. First, the purchaser will not necessarily get a complete discharge for the moneys charged on this estate. Secondly, the purchaser, having bought from vendors selling as beneficial owners, cannot be forced to accept a title of a different character. Thirdly, this is too doubtful a title to be forced upon a purchaser. He is a willing purchaser but requires to be protected from possible future litigation. The vendors' proper course was to have taken out an originating summons, making the beneficiaries parties, and then the order of the Court would be sufficient protection to the purchaser. Here the order will not protect the purchaser. No mention was made in the contract of the charge. The trusts of the legacies are on the title, and the purchaser may have to show hereafter that the trustee sold for the full value. We say the purchaser must be satisfied that the legacies have been wholly discharged. The requisition, therefore, has not been complied

(1) (1875) L. R. 7 H. L. 731.

(2) (1894) 63 L. J. (Ch.) 596.

with. An analogous case is that of *Pell v. De Winton* (1), where part of the mortgaged property only was sold, and it was held that the estate was not discharged: *Lewin on Trusts*, 12th ed. p. 742, note (b).

On the second point as to the construction of the contract a different title is now sought to be put upon the purchaser: *In re Bryant and Barningham's Contract* (2); *In re Head's Trustees and Macdonald*. (3)

On the third ground of objection there are many authorities. The Court will not force the title upon a purchaser where the matter depends upon a question of controverted fact, or where the difficulty could have been cleared up, as it ought to have been: *In re Thackwray and Young's Contract* (4); *In re New Land Development Association and Gray* (5); *In re Trustees of Hollis' Hospital and Hague's Contract* (6); *In re Handman and Wilcox's Contract* (7); *In re Nichols and Von Joel's Contract* (8); *Smith v. Colbourne*. (9) The vendors have refused the offer of a construction summons. We ask, therefore, for a return of the deposit and the costs of investigating the title.

A. Underhill in reply. If the purchaser's argument were to succeed, it would shake an immense number of titles throughout the country, including some on this very estate. There is little probability of a man selling his own property at an undervalue.

Cur. adv. vult.

Dec. 2. EVE J. At the date of the contract in which this summons is intituled the leasehold house and premises thereby contracted to be sold belonged to the vendors, George Medley Morrell, and the said George Medley Morrell and Charles Warwick Whitworth, as legal personal representatives of the late Arthur Robert Morrell, in equal shares, charged, together with other freehold and leasehold properties under the will and codicil of the late George Morrell, father of the said G. M. Morrell and A. R.

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| (1) (1857) 4 Jur. (N.S.) 225; 2 | (5) [1892] 2 Ch. 138. |
| De G. & J. 13. | (6) [1899] 2 Ch. 540. |
| (2) (1890) 44 Ch. D. 218. | (7) [1902] 1 Ch. 599. |
| (3) (1890) 45 Ch. D. 310. | (8) [1910] 1 Ch. 43. |
| (4) (1888) 40 Ch. D. 34. | (9) [1914] 2 Ch. 533. |

EVE J. Morrell, with payment to the said G. M. Morrell as surviving trustee for his two sisters and their issue of the unpaid balance of two settled legacies of 10,000*l.* each. The unpaid balance amounted to 16,000*l.*, payable according to the tenor of the will in eight equal half-yearly instalments and carrying interest in the meantime at the rate of 5 per cent. per annum.

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No question arises on the contract itself; it is an ordinary contract for the sale and purchase of the leasehold premises at the price of 3000*l.* No mention of the premises being subject to any charge is made.

The purchaser insists that the vendors cannot make a good title to the property without payment to the trustee of the settled legacies of the full 16,000*l.* and interest; the vendors on the other hand contend that on payment to the trustee of the purchase price of 3000*l.* the premises can be assured to the purchaser freed and discharged from the 16,000*l.* and interest, and by this summons they claim a declaration to this effect.

The point in issue raises the question whether a trustee mortgagee has the power to release part of his security on receipt of the whole of the purchase-money produced thereby. I think there can be no reasonable doubt that he has. The contrary conclusion would lead to results often unsatisfactory and occasionally inimical to the interest of the cestui que trust—the inability, for example, to take advantage of some fortuitous and possibly temporary increase in the value of a particular item in the security, and to realize it at a high price, or, again, the missing of a favourable opportunity to increase the margin between debt and security by applying the full purchase price of a part of the latter to the reduction of the former.

In the present case, where the debt is made payable by instalments and is charged upon residuary realty comprising numerous items, the existence of a power to release items realized to meet the successive instalments would seem to follow almost as a matter of course.

But it is argued that, even if this be so, the title ought not to be forced on the purchaser here, first, because no mention is made in the contract of the fact that the property was subject to the charge, and, secondly, because the purchaser, having notice

of the trust, may be called upon hereafter to prove that the trustee did not commit a breach of trust in accepting a price representing less than the full value of the property released.

There is nothing, in my opinion, in the first of these objections. The contract is for the sale of the premises free from incumbrances, and inasmuch as the vendors always contemplated and intended that this result should be brought about by the incumbrancer joining in the conveyance and releasing the premises, it was quite unnecessary to refer to the charge in the contract. From their point of view the matter was one of conveyance, not of title.

Nor am I able to hold that the purchaser is really prejudiced in the manner indicated by the second objection. The trustee having the power, as I have held that he has, to release the property on receipt of the whole purchase price, the position of the purchaser is not essentially different from that of any ordinary purchaser from a trustee, except that this purchaser has the advantage accruing from the circumstance that the purchase price has been fixed by a bargain not with the trustee but with the beneficial owners of the property.

In these circumstances can it fairly be said that the title is so doubtful, or that its validity is so dependent on the purchaser being able to establish matters of fact hereafter, that I ought not to impose it on him? I do not think it can. In my opinion the vendors are entitled to the declaration they ask and to the costs of the summons.

Solicitors: *Petch & Co., for Barstow, Midgley & Cross, Harrogate; Collyer-Bristow, Curtis & Co., for Titley & Paver-Crow, Harrogate.*

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NEVILLE J.

In re DAWSON.

1914

PATTISSON *v.* BATHURST.

Nov. 12, 18.

[1914 D. 554.]

Will—Charitable Legacy—Debentures of Australian Land Company—Office in London—"Interest in land"—Australian Law—Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), ss. 4, 10.

A testator who died in 1891 bequeathed, after a life interest, so much of his residuary personal estate as was by law applicable to charitable legacies to two charities. Part of his residuary estate at his death consisted of 3000*l.* secured by the debentures of an Australian land company which were a charge upon all the real and personal assets of the company. The only property in England possessed by the company was some furniture and a leasehold office in London of no appreciable value. By the law of Australia money charged on land could be validly given by will to charitable purposes:—

Held, that the debentures did not pass to the charities.

ADJOURNED SUMMONS.

Richard Dawson by his will, dated January 19, 1891, after appointing two persons executors and trustees of his will, and after making divers specific and pecuniary devises and bequests, gave the residue of his real and personal estate unto his trustees upon usual trusts for sale, conversion, and investment, and directed his trustees to stand possessed of the trust premises, in the events which happened, for his son William Dawson for life, and after his death, as to so much of the trust premises as might not by law be applicable to charitable legacies, upon trust for his nephew Richard Watkins absolutely, and as to so much of the trust premises as might by law be applicable to charitable legacies upon trust for the Sussex County Hospital at Brighton and Mrs. Gladstone's Hospital for Convalescent Patients at Woodford in equal shares.

The testator died in February, 1891, and part of his residuary estate at that time consisted of 3000*l.* in debentures of the South Australian Land Mortgage and Agency Company, Limited, and 3000*l.* in debentures of the Anglo-Australian Investment Finance and Land Company, Limited.

Richard Watkins predeceased the testator.

William Dawson, who was the only child and therefore the NEVILLE J. heir-at-law and sole next of kin of the testator, died in 1913, and the defendant Bathurst was his legal personal representative. Questions then arose under the testator's will, and the plaintiffs, who were the executors of the surviving trustee of the testator's will, took out a summons to determine (amongst other things) whether the debentures of the two Australian land companies could be validly bequeathed for charitable purposes.

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As the testator died before the passing of the Mortmain and Charitable Uses Act, 1891, the law applicable to his residuary estate was that comprised in the Mortmain and Charitable Uses Act, 1888.

The debentures of each company were in common form and were a charge upon "all the real and personal property and assets" of the company for the due payment of the moneys thereby secured: there was no debenture trust deed. At the time when the testator acquired his debentures both companies had considerable land and other property in Australia, but no property in England other than an office in London and some office furniture. In the case of the South Australian Land Mortgage and Agency Company, Limited, its registered office was at 2, Moor-gate Street Buildings, which consisted of four rooms held under a five years' agreement at rack rent, and as the tenancy expired in September, 1891, it was of no value. The company renewed the tenancy after September, 1891, and was still a going concern. It paid off the debentures in 1893. In the case of the Anglo-Australian Investment Finance and Land Company, Limited, it had an office in Lombard Street to register transfers of shares, and some furniture of small value. In 1894 a debenture-holders' action was instituted against the company in England in which the property and assets of the company were realized, and the executors of the testator received 1520*l.* in respect of their debentures.

It appeared that according to the law of South Australia charities could acquire and hold land in South Australia as freely as a private individual, and that any moneys forming part of the estate of a testator charged on land situate in South Australia could be validly given by his will for charitable

NEVILLE J. purposes, and that the law was the same in all the Australian States.

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S. A. Sampson, for the plaintiffs.

Jenkins, K.C., and *M. J. Beebee*, for the defendant Bathurst.

It is submitted that the facts are all one way. The testator's death is the time to ascertain the pure personalty: Theobald on Wills, 7th ed. p. 381. Admitting that land in Australia can by the law of that Colony be given by will for charitable purposes, these debentures, if they did not charge land in England, would pass to the defendant charities. But the companies had land in England. They had leasehold offices in London which were an interest in land within s. 10 of the Mortmain and Charitable Uses Act, 1888. It is clear on the authorities that money charged on land cannot be bequeathed to a charity, and that where there is a mixed fund there can be no apportionment so as to make that portion of the security which would be personalty available for the charitable bequest: *In re Hamilton* (1); *Brook v. Badley*. (2) Therefore the charities are not entitled to these debentures.

Butcher, K.C., and *J. M. Paterson*, for the Sussex County Hospital. No doubt the leasehold offices were an interest in land within ss. 4 and 10 of the Act of 1888 and were included in the debentures, and the general current of authority is not disputed. The Act is set out and the authorities are collected in Tudor on Charities, 4th ed. pp. 434 et seq. But this is an exceptional case, and the true test is what was the nature of the testator's interest in the property: *In re Watts*. (3)

Here the debentures although they theoretically included the London offices were substantially a charge on the Australian assets of the companies, which in both cases were very considerable. But the lease of the South Australian Land Mortgage and Agency Company, Limited, was at a rack rent and had only seven months to run and was of no value. There are no particulars of the tenancy on which the other company held its London office, but the fair inference is that it was of a trivial

(1) [1896] 2 Ch. 617.

(2) (1868) L. R. 3 Ch. 672.

(3) (1885) 29 Ch. D. 947, 953.

nature. If such an interest is to invalidate a charitable bequest, where is the line to be drawn? It reduces the policy of the Mortmain Acts, the object of which was to prevent the alienation of land for charitable uses to the disherison of heirs, to an absurdity. It is submitted that the interest in land in England of these two companies was of so infinitesimal a value at the date of the testator's death that it should be disregarded and should not invalidate the gift to the charities. The principle *de minimis* applies: Broom's Legal Maxims, 8th ed. p. 118.

Peterson, K.C., and *O. Simpkin*, for Mrs. Gladstone's Convalescent Home, argued to the same effect.

Jenkins, K.C., in reply.

Cur. adv. vult.

Nov. 18. NEVILLE J. In this case I have examined the authorities upon the question whether these two lots of debentures were pure or impure personalty. I have come to the conclusion that this case cannot be distinguished from other cases where land is mixed with personalty. It is quite true that here in each case the interest in land in England that the company had was only a leasehold office, the value of which was exceedingly small, but it is included in the security as well as the pure personalty. The debentures therefore are a charge on mixed personalty and cannot pass to the charities, but go to the legal personal representative of the testator's son.

Solicitors: *Hores, Pattisson & Co.*; *Clarke, Calkin & Son*, for *Howlett & Clarke, Brighton*; *Oliver & Lyall*.

H. L. F.

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Dec. 2.

In re AYNLEY.KYRLE *v.* TURNER.

[1914 A. 123.]

Will—Legacy—Ademption—Bequest for Benefit of Vicar of Parish Church—Bequest expressed to be in Pursuance of Wishes of Testator's Deceased Wife—Subsequent Gift by Deed of Land for same Purpose—Recited to be in Memory of Testator's Wife—Parol Evidence—Admissibility—Codicil confirming Will.

A. by will, dated December 31, 1904, gave 500*l.* to trustees upon trust to purchase land to be added to glebe of parish church. The will stated that the bequest was made "in pursuance of the express wish of my wife," his wife having died in 1896.

In 1905 he purchased a piece of land in the parish for 375*l.*, and had it conveyed to trustees to be added to the glebe. The deed recited that the land was so bought and conveyed in memory of the testator's wife. In 1911 the testator made a codicil which gave certain additional legacies and in all other respects confirmed his will; he died in 1913:—

Held, that both will and deed clearly expressed the motive and object of the respective gifts, and they were not the same; and that parol evidence was not admissible to vary their construction. There was therefore no ademption.

The Court of Appeal treated the matter as if there were no codicil, but held that it was a fact which could not have been disregarded had they been disposed to hold that there was ademption.

Decision of Joyce J. [1914] 2 Ch. 422 affirmed on different grounds.

THE testator, the Reverend John Cruger Murray Aynsley, began his will, dated December 31, 1904, with the statement: "I wish to state that in making this my will and in disposing of my estate in manner hereinafter appearing I have endeavoured to give full effect to what I know and believe to have been my wife's wishes." He then appointed the plaintiffs trustees of his will and, after making other dispositions of his property, by clause 25 of his will gave them the sum of 500*l.* upon trust to invest the same in such manner as should appear to them in their absolute discretion to be to the best advantage in the purchase of land in the parish of Madley in the county of Hereford to be used as glebe land for the vicarage of the parish church of Madley aforesaid and to be conveyed and assured to the person or

persons or body or bodies politic or corporate entitled to hold the same for the purposes aforesaid. The testator then gave directions for interim investment and payment of the income in the meantime to the vicar (clause 26) and proceeded (clause 27) : "I declare that the bequest lastly hereinbefore contained is made by me in pursuance of the express wish of my said wife to do something for the said parish." The testator's wife died in 1896.

It appeared from the evidence that shortly after her funeral the testator told the vicar of the parish church that he wished to do something in memory of his wife, and subsequently said that he thought what his wife would have liked best of all would be the gift of a piece of land in Madley known as St. Mary's Meadow. In 1905 the vicar heard that this piece of land was for sale and told the testator. The testator bought it and it was conveyed to him. Then by an indenture of conveyance, dated November 25, 1905, after a recital which stated that the testator had purchased the property with the object and intention of presenting the same to the living in memory of his wife, Harriett Georgina Maria Murray Aynsley, who was buried in the churchyard of the same parish, the property was conveyed to the Hereford Diocesan Finance Association upon trust for the augmentation of the endowment of the incumbent for the time being of the said parish of Madley with such and the same beneficial interests therein and subject to such obligations as if the same were a part of the glebe of the said living.

The testator made a codicil confirming his will in 1912, and died in 1913.

The trustees of the will took out this summons, to which the vicar of the parish, the Hereford Diocesan Finance Association, and the residuary legatees were defendants, for the determination of the question whether the legacy of 500*l.* bequeathed by the testator's will was adeemed wholly or partly by the conveyance of November 25, 1905, by the testator to the defendant association.

The summons came on before Joyce J., and he decided that there was no ademption. (1)

The residuary legatees appealed.

(1) [1914] 2 Ch. 422.

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C. A. *Maugham, K.C.*, and *Whitmore Richards*, for the appellants.
 1914 Joyce J. relied very much on the confirmation of the will by
 AYNLEY, the codicil after the conveyance; but *Powys v. Mansfield* (1)
In re. shows that when ademption has taken place the subsequent
 KYRLE revival of the will by a codicil does not restore the legacy. *In re*
v. *Pollock* (2), a case before Lord Selborne, shows that the evidence
 TURNER. of the conversations with the vicar is admissible. But without
 — them the documents show that both gifts were made for the same
 purpose, the performing a moral obligation to fulfil his wife's
 wishes. [They also cited *Rosewell v. Bennett*. (3)]

Cave, K.C., and *H. E. Wright*, for the respondents, were not called upon.

LORD COZENS-HARDY M.R. This is an appeal from a decision of Joyce J., who has held that a bequest of 500*l.* is not adeemed.

The question turns on the will of the testator, Mr. Aynsley, dated December 31, 1904. His wife had died in 1896, and the will was made about eight years afterwards. The testator begins his will in this way: "I wish to state that in making this my will and disposing of my estate in manner hereinafter appearing I have endeavoured to give full effect to what I know and believe to have been my wife's wishes." Then after making a number of specific and pecuniary legacies and dispositions he proceeded in clause 25 to bequeath the sum of 500*l.* to trustees "upon trust that the trustees or trustee shall invest the same in such manner both as to the land to be purchased and as to the time of the purchase as shall appear to them him or her in their his or her absolute and uncontrolled discretion to be to the best advantage in the purchase of land in the parish of Madley in the county of Hereford such land to be used as glebe land for the vicarage of the parish church of Madley aforesaid and to be conveyed and assured to the person or persons or body or bodies politic or corporate entitled to receive take and hold the same for the purpose aforesaid." Then in clause 26 there is a provision for the interim investment of the money, and in clause 27 he said: "And I declare that the bequest lastly hereinbefore contained is made by

(1) (1837) 3 My. & Cr. 359, 376.

(2) (1885) 28 Ch. D. 552.

(3) (1744) 3 Atk. 77.

me in pursuance of the express wish of my said wife to do something for the said parish."

The will having been made in December, 1904, in November, 1905, there was a deed of gift executed by the testator in rather a peculiar form. The vicar, Mr. Turner, is a party to the conveyance, and it recites a deed of August 2, 1905, which was a conveyance of a piece of land for 423*l.*, of which 375*l.* was paid by the testator and the balance of 48*l.* paid by the vicar on the condition that he was to be free to cut timber growing on the property. I do not pause to consider whether the cutting of the timber could have properly been made. This piece of land was now conveyed to the Hereford Diocesan Finance Association to hold "upon trust for the augmentation of the endowments of the incumbent for the time being of the living of the said parish of Madley with such and the same beneficial interest therein and subject to such obligations as if the same was a part of the glebe of the said living."

It has been argued before us that this conveyance of the land purchased for 375*l.*, so far as the testator was concerned, is an ademption of the legacy of 500*l.* on the ground that the object of the legacy and the conveyance was the same. I am quite unable to follow that. It is not a case in which we are left in any doubt as to the objects in view. Both the will and the deed contain language which is clear and unambiguous. In the case of the will the testator begins by saying that in making his will he has endeavoured to give full effect to what he knew and believed to have been his wife's wishes, and this is made even more precise by clause 27, which deals with the gift of the 500*l.*, and says that the bequest was made "in pursuance of the express wish of my said wife to do something for the said parish." Then what was the object, purpose, and intent of the subsequent conveyance? It was something done in memory of his late wife, and not at all of anything done under a moral obligation to give effect to her express wish.

We have been asked to say that the construction of these two documents ought to be varied by reason of a conversation between the testator and the vicar seven or eight years before the date of the will. It was a conversation in which the testator

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said he should like to do something in memory of his wife. The vicar suggested the gift of an organ or a stained glass window, but neither suggestion met with the testator's approval, and a few days later he said that he thought the gift of the meadow afterwards purchased would be most in accordance with his wife's wish. I desire to say that I do not think that evidence is admissible. I am clearly of opinion that it ought not to be admitted, but in any case it does not appear to me to carry the matter any further.

There being nothing to show a common purpose in the gifts and no identity of the two gifts, and there being a difference in nature of the two properties, one being a legacy of 500*l.* and the other a gift of land for which the testator gave 375*l.*, I decline to hold that the legacy of 500*l.* has been adeemed by the gift of land *inter vivos*.

There was a codicil executed by the testator after the date of the conveyance in which he confirmed his will, and Joyce J. attached considerable importance to this codicil. If necessary I also should have attached great importance to it, but I have been content to treat the matter as if no codicil had ever been made, though it is a fact which could not have been disregarded if we had been disposed to hold that there had been ademption.

I think, therefore, that the decision of Joyce J. was right, and that the appeal must be dismissed.

KENNEDY L.J. I agree and entirely for the same reasons, to which I have nothing to add.

WARRINGTON J. I agree also.

Solicitors: *Cree & Turner, for E. Stanley Lloyd, Ludlow; Crowders, Vizard, Oldham & Co., for Humfrys & Symonds, Hereford.*

J. R. B.

FERNÉE v. GORLITZ.

[1913 F. 216.]

EVE J.

1914

Practice—Solicitor—Commencing Action on behalf of Infant—Next Friend an Infant—Setting aside Writ—Costs of Defendants—Damages—Personal Liability of Solicitor.

Feb. 25 ;
March 3, 17 ;
June 19 ;
Nov. 19.

Solicitor, having commenced action on behalf of an infant by her next friend who was also an infant:—

Held, personally liable, as between solicitor and client, for costs which defendants had incurred in defending action, including costs of application to set aside writ, but excluding costs of defendants who had put forward the next friend.

SUMMONS IN ACTION.

On February 8, 1913, the writ in this action was issued on behalf of the plaintiff, who was an infant acting by her next friend, claiming to set aside an agreement on the ground that it was not for her benefit.

At the date of the issue of the writ the next friend was himself an infant.

The circumstances under which the next friend became next friend were as follows.

The solicitors who acted for the plaintiff and also, up to September 12, 1913, for her parents, George and Eliza Fernée (two of the defendants), had told the parents that a next friend would be required because the plaintiff was an infant, and had asked them to name some person. After the father had suggested some one who was not willing to act, the mother put forward a young man named Morgan, who was then between the age of twenty and twenty-one, and who accepted the office.

On February 11, 1913, the defendants' solicitors wrote to the plaintiff's solicitors a letter in which, after saying they could not find Mr. Morgan's address as given by the plaintiff's solicitors, they continued "We would like in particular to know . . . what is his age."

To that letter the plaintiff's solicitors replied (after answering as to the address): "Beyond giving you this information we do not

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feel called upon to answer your further questions without any reason being assigned. Perhaps you will kindly let us know why you wish to have the information."

The defendants' solicitors replied: "Our reason for wanting the information arises from our desire to know the exact position of your client and what his object is in bringing the action."

The plaintiff's solicitors replied that "the information for which you asked with regard to Mr. Morgan cannot we conceive have any possible bearing on the merits of the action. We have told you what Mr. Morgan's position is and we think you will find the plaintiffs' object in bringing the action endorsed on the writ and we do not think that we can usefully add anything further to that endorsement."

Subsequently in October, 1913, the defendants' solicitors discovered that the next friend had been born on September 22, 1892, and consequently was under age at the date of the issue of the writ.

The defendants (who were the Fernées and a Mr. and Mrs. Gorlitz, the agreement having been made between the plaintiff and her parents and Mrs. Gorlitz) thereupon took out this summons to set aside the writ.

The plaintiff's solicitors' evidence was that they could not remember whether they asked Morgan, when he instructed them, what his age was, but from his appearance and demeanour they judged him to be of the age of twenty-five or twenty-six.

P. O. Lawrence, K.C., and *J. F. W. Galbraith*, for the applicants. The defendants ask that the writ and subsequent proceedings may be set aside, as the whole matter was irregular. The next friend was an infant when the writ was issued, and the proceedings cannot be put right. An infant cannot authorize a solicitor to commence proceedings. The action was vicious from the start, and should be dismissed with costs to be paid by the solicitors who had the conduct of the proceedings for the plaintiff: *Dyke v. Stephens* (1); *Nurse v. Durnford* (2); *Newbiggin-by-the-Sea Gas Co. v. Armstrong* (3); *Fricker v. Van Grutten* (4);

(1) (1885) 30 Ch. D. 189.

(2) (1879) 13 Ch. D. 764.

(3) (1879) 13 Ch. D. 310.

(4) [1896] 2 Ch. 649.

Geilinger v. Gibbs (1); *Yonge v. Toynbee* (2); *Simmons v. Liberal Opinion Limited* (3) The whole thing is a nullity. The practice laid down by Order xvi., rr. 11 and 20, has not been followed. No proper consent by the next friend has been filed under r. 20, nor is there any evidence of the adoption by the next friend of the action when he came of age.

A. H. Jessel, K.C., and *W. F. Swords*, for the solicitors. The defendants the Fernées introduced to the plaintiff's solicitors a next friend who was under age and, having misled the solicitors, cannot claim costs. The other defendants, Mr. and Mrs. Gorlitz, having associated themselves with the Fernées, cannot either.

An action commenced by an infant without a next friend is not necessarily a bad action: *Flight v. Bolland*. (4) There is nothing inherently wrong in such an action. In *Ex parte Brocklebank* (5) it was held that an infant might issue a debtor's summons in his own name. Bringing an action in the name of an infant is a representation that the costs will be paid, but there is no objection in the fact of the next friend being an infant. In *Wade v. Keefe* (6), a solicitor who entered appearance for an infant was held not liable for costs. Here the next friend appeared to be of full age and the solicitors did everything they could. The cases cited on the other side do not support the view that the solicitor must make sure that the next friend is of full age. There can be no misrepresentation by one party when the facts are known to the other party. Nor can a party be said to warrant the existence of a fact as to which he declines to make any statement. Cases like *Yonge v. Toynbee* (2), therefore, have no application. The Court should hold that the plaintiff's solicitors have not made any misrepresentation or committed any negligence.

But, if they are liable for any costs, they should not be ordered to pay as between solicitor and client. They ought not to be in any worse position than the solicitor in *Fricke v. Van Grutten* (7), where an order against the plaintiff had been obtained. Damages do not mean that a party is to be put in the same position as if

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(1) [1897] 1 Ch. 479.

(4) (1828) 4 Russ. 298.

(2) [1910] 1 K. B. 215.

(5) (1877) 6 Ch. D. 358.

(3) [1911] 1 K. B. 966.

(6) (1888) 22 L. R. Ir. 154.

(7) [1896] 2 Ch. 649.

EVE J. no expense at all had been incurred; he is not to have every  
1914 penny which he has expended refunded to him. [They also  
FERNÉE referred to *Porter v. Fraser*. (1)]

v. *P. O. Lawrence, K.C.*, in reply. Upon the evidence there is  
GORLITZ. no warranty by the Fernées that the next friend was of full age,  
— nor any suggestion that they knew he was an infant.

The plaintiff did not appear.

EVE J. In instituting this action on behalf of the infant the solicitors responsible for the proceedings represented to the defendants that the next friend by whom the infant was suing was qualified by age to act in that capacity. It now turns out that he was under twenty-one at the date of the writ. I do not wish to cast any reflection upon the solicitors, who may well have been misled—as they say they were—by the appearance of the young man, but it is a pity they did not satisfy themselves on the point when put on inquiry by the receipt of a letter shortly after the issue of the writ from the defendants' solicitors asking in terms what his age was. However they took the risk, and, in the event, I have now to decide what is the extent of the liability they have come under by reason of the representation turning out to be untrue. In other words, what is the measure of damages they have to make good and to whom are they liable? I know something of this case because the matter has been before me on more than one occasion, and I know how unsatisfactory has been the attitude from time to time of the plaintiff's parents. I do not intend to award them any damages. It has been pointed out that there is no evidence that the parents knew this young man to be under twenty-one or that they represented that he was of full age when they knew that he was not. That is true. But they were told to select a competent next friend of full age, and it was the mother who suggested this young man. Moreover for many months after the issue of the writ they and the plaintiff were all represented in the action by the same solicitors. I do not think in these circumstances I ought to award them any damages.

But the position of the other two defendants is different.

(1) (1912) 29 Times L. R. 91.

They are, I think, entitled to damages. But what is the measure of the damages? Is it the costs which they might have recovered from a competent and solvent next friend if they had succeeded in the action, or is it the expense to which they have been put in consequence of this futile proceeding? Swinfen Eady J., in dealing with the case of an agent falsely representing he has an authority which in fact he has not, adopts in *Yonge v. Toynbee* (1) the following statement of the law by Lord Esher M.R. (2): "The principle of *Collen v. Wright* (3) extends further than the case of one person inducing another to enter into a contract. The rule to be deduced is, that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred." The damage which has occurred to these two defendants is represented by the costs which they have incurred in defending the action, and, in my opinion, it is these costs, including the costs of this application, to be taxed as between solicitor and client, which the plaintiff's solicitors are liable to pay, and I make an order accordingly.

Solicitors: *Rubinstein, Nash & Co.; Reid Sharman & White.*

(1) [1910] 1 K. B. 215, 231.

*phreys* (1886) 18 Q. B. D. 54, 60.

(2) In *Firbank's Executors v. Hum-*

(3) (1857) 8 E. & B. 647.

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NEVILLE J.

*In re R. P. MORGAN & CO.*

1914  
 Nov. 18, 19. *Solicitor and Client—Costs—Taxation—Case for Counsel before Litigation—  
 Perusing Particulars—Schedule of Documents on Change of Solicitors—  
 “Other business”—General Order, Solicitors Remuneration Act, 1881  
 (44 & 45 Vict. c. 44), r. 2, Sched. II.—Masters’ Practice Notes—Rules of  
 the Supreme Court, 1883, Appendix N, Nos. 55, 100.*

Drawing a case for counsel in contemplation of litigation comes within the expression “other business” in r. 2 of the General Order, Solicitors Remuneration Act, 1881, and, being a “document” within Sched. II. thereto, is properly charged for at 2s. a folio. The allowance in that schedule is not confined to conveyancing business.

A solicitor whose retainer is withdrawn and who prepares a schedule of the documents to be handed over to the new solicitor, which is accepted by the latter, is entitled to charge for preparing the same.

Perusal of particulars delivered in an action under an order may be equivalent to perusal of an amendment of the pleadings and may be charged for as such. It is a matter in the discretion of the taxing Master.

## ADJOURNED SUMMONS.

This was an application to review the decision of the taxing Master.

In March, 1911, a Mrs. Price employed R. P. Morgan & Co. a firm of solicitors at Neath, in connection with the dealings of her then solicitor, Mr. Jenkins, with respect to certain mortgages of freeholds, and in August, 1912, an action was commenced against Mr. Jenkins to make him liable to make good the losses incurred by Mrs. Jenkins by reason of his neglect of duty as her solicitor.

In November, 1913, after the pleadings in the action had been closed, Mrs. Price withdrew her retainer from R. P. Morgan & Co. and employed Stanley Evans & Co. as her solicitors. Subsequently R. P. Morgan & Co. delivered to Mrs. Price their bill of costs for the period they had acted for her, and on March 19, 1914, she took out the common order to tax.

On the taxation the following items (amongst others) were objected to on behalf of Mrs. Price.

Item 25. "May 11, 1911.

NEVILLE J.

|                                              | £. | s. | d.  | 1914                                       |
|----------------------------------------------|----|----|-----|--------------------------------------------|
| "Drawing case for the opinion of counsel     |    |    |     |                                            |
| "Folios 23 . . . . .                         | 2  | 6  | 0"  | R. P.<br>MORGAN<br>& Co.,<br><i>In re.</i> |
| Item 56. "Oct. 23, 1911.                     |    |    |     |                                            |
| "Drawing case for further opinion of counsel |    |    |     |                                            |
| "Folios 8 . . . . .                          | 0  | 16 | 0." |                                            |

The objection was: "A charge of 2s. per folio is strictly limited to conveyancing work, and even in those cases the drawing must be as careful as for a deed: see item 55 of Practice Masters' Notes. It is submitted that *In re Mahon* (1) does not govern this case. These cases were not drawn as carefully as a deed. They did not relate to conveyancing matters, but related solely to and in contemplation of litigation. It has been conceded that, if these cases for counsel were prepared after the issue of the writ, the charge would be 1s. per folio, and it is submitted that a solicitor is not entitled to get double this fee merely because in point of time the cases were sent to counsel before instead of after action brought."

The taxing Master overruled the objection, being of opinion that the proper fee for drawing the two cases was 2s. per folio, and that *In re Mahon* (1) correctly stated the law and the practice which should be followed.

Item 262. "June, 1913.

|                                                   | s. | d.  |
|---------------------------------------------------|----|-----|
| "Perusing particulars delivered pursuant to order | 6  | 8." |

The objection was: "The scale charge for perusing particulars is 4d. per folio. The particulars were four folios in length. It is submitted that the true construction of the Practice Note in Appendix N is that, if the particulars are lengthy, the allowance for perusal of particulars may be less than 4d. a folio, but in no case can it be allowed at more than 4d. a folio. The dictum of Vaughan Williams L.J. in *Milbank v. Milbank* (2) has no relevancy to the present case."

The taxing Master held that the charge was not 4d. a folio, but 6s. 8d. for perusing what in effect was an amended pleading,

(1) [1893] 1 Ch. 507.

(2) [1900] 1 Ch. 376, 385.

NEVILLE J. that *Milbank v. Milbank* (1) applied, and he overruled the  
 1914 objection.

R. P.  
 MORGAN  
 & Co.,  
*In re.*

Item 299. "Nov. 1913.

"Drawing schedule of deeds to be handed to s. d.  
 your new solicitor, and fair copy . . . 10 0."

The objection was: "It is submitted that a solicitor whose retainer has been withdrawn cannot charge his late client for preparing a schedule of papers for the purpose of his own convenience when handing such papers over to the new solicitor, and that this is unnecessary."

The taxing Master overruled the objection, being of opinion that the solicitors were entitled to have a schedule of the documents handed over, and that the expense should fall upon the client.

Mrs. Price then took out a summons to review the taxing Master's decision, which was adjourned into Court.

*J. E. Harman*, for the summons. Rule 2 of the General Order, Solicitors Remuneration Act, 1881, and Sched. II. apply only to conveyancing business whether in or out of an action: *Stanford v. Roberts* (2); *In re Merchant Taylors' Co.* (3); Scott on Costs, 11th ed. p. 1236. *In re Mahon* (4) does not govern this case. It only decides that in a conveyancing matter a case for counsel is a "document" under the heading "Instructions for and drawing and perusing deeds, wills and other documents" in the schedule. The words "other business" in the rule are confined to conveyancing business not being the business previously defined in the rule, and do not touch work in or leading to an action. The rule and the schedule have never been held to apply to a case for counsel leading to litigation, which it is submitted really comes under the Practice Masters' Notes in Appendix N. There at p. 1627 (Annual Practice, ed. 1914) under "Cases for Counsel" it is stated "the allowance for drawing cases for counsel in other than conveyancing business is 1s. per folio; in conveyancing cases the allowance is 2s. a folio," and

(1) [1900] 1 Ch. 376.

(2) (1884) 26 Ch. D. 155.

(3) (1885) 30 Ch. D. 28.

(4) [1893] 1 Ch. 507.

No. 55 in the Appendix (*ibid.* p. 1661) under "Drawing" states NEVILLE J. that the charge of 2s. per folio is strictly limited to conveyancing work.

[NEVILLE J. The Practice Masters' Notes are useful in expressing the views of the Masters, but do not bind the Court.]

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It is submitted that the words "other documents" in Sched. II. do not include a case for counsel with a view and leading to litigation, that the Practice Masters' Notes apply, and that the taxing Master has not properly exercised his discretion.

*Owen Thompson*, for the respondents, was not called upon.

NEVILLE J. The objection taken is that the taxing Master has allowed a charge of 2s. per folio for drawing a case for counsel with a view to and in contemplation of litigation. It is said that the charge is not covered by r. 2 of the General Order to the Solicitors Remuneration Act, 1881. Sect. 2 of the Act provides that a general order may be made to regulate "the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements and other matters of conveyancing, and in respect of other business not being business in any action, or transacted in any Court, or in the chambers of any judge or Master, and not being otherwise contentious business," and r. 2 of the General Order, which follows the language of the section, after providing for the remuneration of solicitors in certain conveyancing matters, says, at the end of sub-s. (c), that the remuneration of a solicitor "in respect of all other deeds or documents and of all other business the remuneration for which is not hereinbefore provided for" is to be regulated according to Sched. II., and then the schedule prescribes a scale of 2s. a folio for drawing "deeds, wills, and other documents." The question is whether drawing a case for counsel not in a conveyancing matter and in contemplation of litigation comes within the provisions of that rule. Now in *Stanford v. Roberts* (1) Kay J. held that the scale applied to conveyancing business whether in an action or not, and that "other business" meant business other than business in an action, that is, that the conveyancing scale applies so long as it is not business in an action and is not

(1) 26 Ch. D. 155.



NEVILLE J. contentious business, and his decision was approved by the Court of Appeal in *In re Merchant Taylors' Co.* (1) It is said that it is laid down by text-writers that Kay J. decided that the allowance in Sched. II. applied to conveyancing business only. I cannot follow that contention, and, if text-writers say that, it is misleading. In my opinion conveyancing business, whether in an action or not, and other business, that is, business not being conveyancing business and not being business in an action nor contentious business, come within the scope of the rule and scale; and in *In re Mahon* (2) North J. decided that a case for counsel was a "document" within Sched. II. I hold therefore that this objection fails.

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*In re.*

The objection to the third item was then argued.

*J. E. Harman*, for the summons. The schedule of documents was prepared after the retainer was withdrawn and was made entirely for the benefit of the solicitors who were discharged. The point is covered by *In re Catlin* (3): Scott on Costs, 11th ed. p. 1181.

*Owen Thompson*, for the respondents. *In re Catlin* (3) is not conclusive. Here the solicitors who were discharged prepared a schedule of the documents to be handed over, and the client and the new solicitors have had the whole practical benefit of it.

NEVILLE J. I think this item was properly allowed by the Master, and that *In re Catlin* (3) does not cover it. Here the solicitors who had been discharged prepared a schedule of the deeds to be handed over to the new solicitors. If the new solicitors had said "We don't want this schedule of deeds" and had handed it back, it would have been different. But they accepted it, and the client has had the benefit of it and must pay for it. *In re Catlin* (3) was a case where a solicitor charged for a schedule of deeds which he had prepared and retained for his own benefit, and took a receipt for it.

*J. E. Harman*, for the summons. The next item is the charge for perusing particulars. This depends on No. 100 in Appendix N,

(1) 30 Ch. D. 28.

(2) [1893] 1 Ch. 507.

(3) (1854) 18 Beav. 508, 514.

Annual Practice (1914), p. 1667, which states that the charge for NEVILLE J. "perusal of particulars" is 4*d.* a folio. The dictum of Vaughan Williams L.J. in *Milbank v. Milbank* (1) that particulars are amendments of pleadings is not in point.

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& Co.,  
*In re.*

*Owen Thompson*, for the respondents, was not called upon.

NEVILLE J. I think this item was rightly charged and was properly allowed by the Master. It was a matter which was clearly within his discretion, and I am not at all sure that it is not the minimum amount that he could allow.

Solicitors: *Stanley Evans & Co.*; *Helder, Roberts & Co.*, for *R. P. Morgan & Co., Neath.*

H. L. F.

*In re* INMAN.

NEVILLE J.

INMAN *v.* INMAN.

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[1914 I. 933.]

Nov. 19.

*Will—Tenant for Life and Remainderman—Trust for Conversion—Power to postpone—Power to retain—"Stocks, funds or securities"—Shares in Canadian Land Company—Wasting Securities—Income in Specie.*

A testator by clause 6 of his will gave all his real and personal estate to trustees upon trust for sale and conversion and to hold the net proceeds as to one moiety upon trust to invest and pay the income to his wife during widowhood, with a gift over, and as to the other moiety upon trust to invest and pay the income to his two daughters for life as tenants in common, with gifts over; clause 9 empowered the trustees to postpone the sale and conversion of all or any part of the estate for so long as they thought fit; and clause 11 empowered the trustees to permit his personal estate invested at his decease upon "any stocks, funds or securities whatsoever yielding income to continue in the same state of investment" so long as they should think fit.

The testator at his death held shares in Canadian land companies which were valuable and paid good dividends, but were of a wasting character and did not come within the investment clause in the will:—

*Held*, on the evidence, that the shares were "stocks" within the meaning of that word in clause 11.

*Held*, also, that under clause 11 the trustees could retain the shares,

(1) [1900] 1 Ch. 376, 385.

NEVILLE J.      and that the tenants for life were entitled to receive in specie all the dividends from the shares.

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*In re Chaytor* [1905] 1 Ch. 233 distinguished.

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#### ADJOURNED SUMMONS.

James Inman by his will, dated May 20, 1912, after appointing his wife and the plaintiffs the executors and trustees of his will, and after making various specific and pecuniary bequests, gave and devised (clause 6) all his real and personal estate to his trustees upon usual trusts for sale and conversion, and out of the moneys to arise from such sale and conversion to pay his debts, funeral and testamentary expenses, and all duties, and to stand possessed of the residue of the said moneys (called his residuary trust estate) upon trust as to one moiety thereof to invest the same and pay the net income of such investments to his wife during widowhood, with a gift over in the event of her marrying again. By clause 7 the testator directed his trustees to stand possessed of the second moiety of his residuary trust estate upon trust to invest and to hold the same upon usual trusts for the benefit of his two daughters as tenants in common and their respective issue, with a gift over in the event of both of his daughters dying without leaving issue who should live to attain a vested interest. By clause 9 the testator empowered his trustees to postpone the sale and conversion of all or any part or parts of his real and personal estate respectively so long as they should deem proper, "but my real estate shall be considered as personalty from the time of my death, and during such postponement my trustees may manage and let upon lease for any term not exceeding twenty-one years or from year to year or cultivate my real and personal estate, and generally out of the income or capital of my real and personal estate make any outlay which my trustees may consider proper for improvements, repairs, insurance, calls on shares, premiums on policies of or otherwise for the benefit of or in respect of my real and personal estate." Clause 10 was a general investment clause; and clause 11 was as follows: "I empower my trustees to permit my personal estate invested at my decease in or upon any stocks, funds or securities whatsoever yielding income to continue in the same state of investment so long as they shall think fit."

The testator died in November, 1912, leaving a large estate. NEVILLE J. During his life he engaged largely in land speculations in Canada, and at the date of his death he held 600 shares of \$25 each fully paid in the Hendy Land Company, Limited, of Vancouver, British Columbia, and 148 shares of \$25 each partly paid up in the Vancouver Land and Improvement Company, Limited. These shares were valuable and formed part of his residuary estate, and the question arose whether the trustees could under clause 11 of the will properly retain the shares unconverted as long as they thought fit; and, if so, whether the testator's widow was entitled to receive in specie as income all the dividends to be paid in respect of the shares, and the trustees took out a summons to determine the matter.

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It appeared that the form of the share certificates of the Hendy Land Company, Limited, was headed "Hendy Land Company, Limited. Capital stock \$105,000,000 : divided into 4200 shares of \$25,000 each," and stated "This is to certify that \_\_\_\_\_ is the holder of \_\_\_\_\_ shares of twenty-five dollars each in the capital stock of the Hendy Land Company, Limited, numbered \_\_\_\_\_ to \_\_\_\_\_ inclusive."

The form of the share certificates of the Vancouver Land and Improvement Company, Limited, was the same.

Both companies were land companies in British Columbia. Their business was to purchase blocks of unimproved land by way of speculation and then, when the value had improved, to resell them in small lots. Upon failure of any purchaser to complete his payments in respect of any lot the company resumed possession and resold it. As between the companies and their shareholders the paid-up capital was small, and if the companies were successful (as they were) the profits were distributed by a limited number of proportionally large dividends, when and as the financial position of the companies from time to time properly permitted, the liabilities, including the paid-up capital, being always first provided for. When all the land had been sold the companies would be wound up, but before such winding-up the profits would be distributed by way of dividend and the capital would be ultimately repaid to the shareholders.

J. B. Lindon, for the plaintiffs.



NEVILLE J. *Jenkins, K.C.*, and *W. R. Sheldon*, for the widow and one of the daughters. The first point is whether these shares come within the words "stocks, funds or securities" in clause 11. Having regard to the context it is submitted that they do. The testator is referring to his investments at the time of his death and uses the word "securities" in a popular sense as equivalent to investments: *In re Rayner* (1); *In re Johnson*. (2) These shares were some of his investments and come within the expression "securities." They are also included in the word "stocks." Each share certificate states the amount of "capital stock" the testator holds in the company.

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*W. Vernon*, for the other daughter, supported this contention.

*Peterson, K.C.*, and *P. F. Stokes*, for the remaindermen. There is not sufficient in the will to take the case out of the general rule. The words "stocks, funds or securities" must be construed in their primary and strict sense and do not include these shares, which certainly cannot be said to be "funds": *Harris v. Harris*. (3)

NEVILLE J. I think, having regard to the language of the will and to the fact that in the share certificates the testator is described as holding so many shares in the capital stock of the company, that I can hold these shares are "stocks" within the meaning of that word in clause 11 of the will.

*Jenkins, K.C.*, and *W. R. Sheldon*, for the widow and one of the daughters. The next question is whether the tenants for life are entitled to the income of these shares in specie. It is submitted that clause 11 sufficiently indicates that the tenants for life are to enjoy in specie the income of investments retained by the trustees. *In re Chaytor* (4) may be cited against us, but it is distinguishable. A power to retain is not necessarily the same as a power to postpone. Here there is a distinct power to retain investments yielding income. The intention is to benefit the tenants for life, and the principle of *In re Thomas* (5) applies. *In re Woods* (6) is not in point.

(1) [1904] 1 Ch. 176, 187.

(2) (1903) 89 L. T. 84.

(3) (1861) 29 Beav. 107.

(4) [1905] 1 Ch. 233.

(5) [1891] 3 Ch. 482.

(6) [1904] 2 Ch. 4.

*W. Vernon*, for the other daughter, adopted the same line of NEVILLE J. argument. On the construction of the will it is purely a question of intention: *Underhill on Trusts*, 7th ed. p. 237; *In re Nicholson*. (1) Here the testator intended that the tenants for life should take the income of retained securities.

*Peterson, K.C.*, and *P. F. Stokes*, for the remaindermen. *In re Chaytor* (2) is precisely in point, and *In re Woods* (3) applies. Power conferred on trustees to postpone a sale or to retain investments unconverted does not alter the rights of tenant for life and remainderman: *Theobald on Wills*, 7th ed. p. 555.

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*In re.*  
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v.  
INMAN.

NEVILLE J. If I thought the judgment of Warrington J. in *In re Chaytor* (2) decided this case I should of course follow it. But I have to consider here a will which in my opinion differs in its provisions materially from those of the will in *In re Chaytor*. (2) In that case the power to postpone and the power to retain investments were only ancillary or subsidiary to the trust for conversion. But here it is obvious that the power to postpone and the power to retain are not powers merely referring or subsidiary to the trust for conversion, and I think that clause 11 is an independent power which authorizes the trustees to retain investments existing at the testator's death which are yielding income and are not within the investment clause. In my opinion the law is correctly stated in *Underhill on Trusts*, 7th ed. at p. 237, where it says: "The question is really one of construction, viz., whether the testator intended the power to postpone should be exercised for the benefit of the tenant for life, or merely for the more convenient realization of the estate; and if the former intention is found, no distinction is made by the Court between unauthorized securities of a wasting nature and those of a permanent nature"; and again at p. 238, "The real point in such cases is whether the power to continue or retain is to be construed as a power to continue or retain permanently, or only until the trustees can sell advantageously. In the first case, the inference is that the power was for the benefit of the tenant for life; in the latter, the

(1) [1909] 2 Ch. 111.

(2) [1905] 1 Ch. 233.

(3) [1904] 2 Ch. 4

NEVILLE J. inference is that it was merely for the convenient administration of the estate." I have already held that the particular shares in this case come within the word "stocks" in clause 11, and I am not prepared to hold that they do not also come within the word "securities" in that clause. I am therefore of opinion that under that clause the trustees can retain these shares and that the tenants for life are entitled to receive in specie the whole of the dividends arising from them.

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Solicitors: *Dod, Longstaffe & Son; Trower, Still & Co.*

H. L. F.

NEVILLE J.

*In re* CONSOLIDATED DIESEL ENGINE  
MANUFACTURERS, LIMITED.

1914  
*Dec. 1.*

[00243 of 1914.]

*Company—Winding-up—Practice—Committee of Inspection—Appointment of Solicitor—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 151, sub-s. 1 (c); s. 158, sub-s. 1; s. 160, sub-s. 9.*

Though s. 151 of the Companies (Consolidation) Act, 1908, enables a liquidator, in a winding-up by the Court, to employ a solicitor with the sanction either of the committee of inspection or the Court, he is not justified in obtaining from the Court *ex parte* its sanction to the appointment of a solicitor to whom he knows the committee of inspection object. He is bound by s. 158, sub-s. 1, to have regard to their directions, and if he thinks their directions unwise he can summon meetings of creditors or contributories to override them under s. 158, sub-s. 2.

THE Consolidated Diesel Engine Manufacturers (hereinafter called the company) was promoted by and was in most respects merely a reconstruction of the Diesel Engine Company (hereinafter called the engine company). The company was ordered to be wound up compulsorily on July 7, 1914, and Sir W. B. Peat was appointed liquidator with a committee of inspection. A meeting had been called on June 25, 1914, for the purpose of passing a resolution for a voluntary winding-up. This was not passed because it did not obtain the necessary statutory majority.

Before the winding-up resolution was put to the vote a shareholder moved that if the company went into liquidation the

liquidator should be requested to employ a firm of solicitors not previously connected with the company. This resolution was carried.

At the date of the winding-up order against the company the engine company was in voluntary liquidation, and Sir W. B. Peat was its liquidator. Before the liquidation Messrs. Goldberg, Barrett & Co. had acted as solicitors for both companies, and they were now acting as solicitors for Sir W. B. Peat in his capacity as liquidator of the engine company. On November 18, 1914, Sir W. B. Peat, without making a communication to the committee of inspection, applied *ex parte* to the Court for, and obtained from the registrar, an order under s. 151 of the Companies (Consolidation) Act, 1908, giving him leave to employ Messrs. Goldberg, Barrett & Co. as his solicitors in the liquidation of the company in the matter of the proposed sale of certain engineering works which the company had acquired in Ipswich. The order was drawn up and completed on the day it was applied for. Later in the day Sir W. B. Peat told the committee of inspection what he had done, and they at once passed a resolution disapproving of the appointment, and they now moved to discharge the order. (1)

(1) The sections of the Companies (Consolidation) Act, 1908, which were referred to are:

Sect. 151, sub-s. 1: "The liquidator in a winding up by the Court shall have power, in the case of a winding up in England with the sanction either of the Court or of the committee of inspection . . . .

(c) . . . . to employ a solicitor or other agent to take any proceedings or do any business which the liquidator is unable to take or do himself; but the sanction in this case must be obtained before the employment, except in cases of urgency, and in those cases it must be shown that no undue delay took place in obtaining the sanction."

Sect. 158, sub-s. 1: "Subject to the provisions of this Act, the liqui-

dator of a company which is being wound up by the Court in England shall, in the administration of the assets of the company and in the distribution thereof among its creditors, have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting, or by the committee of inspection, and any directions given by the creditors or contributories at any general meeting shall in case of conflict be deemed to override any directions given by the committee of inspection."

Sect. 158, sub-s. 2, gives the liquidator power to summon general meetings of creditors or contributories for the purpose of ascertaining their wishes.

Sect. 160, sub-s. 9: "If there is

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NEVILLE J. *R. H. Hodge*, for the motion. This order ought not to have  
 1914  
 CONSOLI- been applied for or made. Sect. 151, sub-s. 1, of the Act gives  
 DATED the liquidator the alternative of applying either to the Court or  
 DIESEL the committee of inspection, but it could not be right for the  
 ENGINE liquidator to go behind the backs of the committee and, without  
 MANU- notice to them, get leave to employ solicitors whom he knows the  
 FACTURERS, committee disapprove. The committee have no personal objec-  
 LIMITED, tion to Messrs. Goldberg, Barrett & Co., but these solicitors have  
*In re.* acted for both companies in a long series of transactions, which  
 — will have to be strictly investigated in the winding-up, and the  
 committee think it would be better to have an independent firm.

*Gore-Browne, K.C.*, and *E. W. Hansell*, for the liquidator. The liquidator only wishes to employ these solicitors in matters relating to the sale of the works at Ipswich. The title is long and intricate, and there have been long negotiations. Messrs. Goldberg, Barrett & Co. are thoroughly familiar with the title and the negotiations. To bring any one else in now would cause great additional expense. In bankruptcy the trustee is bound to go to the committee to get a solicitor appointed. Here he has an alternative and a right to use it.

*R. H. Hodge* in reply.

NEVILLE J. I think in the present case the order of the registrar must be discharged. The liquidator with the knowledge that the committee of inspection, which had been properly appointed, disapproved of the appointment of the present solicitors, and without notice to them, and, as I understand, without even having formally asked their sanction, proceeded to the Court, and upon an ex parte application obtained a direction that these solicitors should be employed in particular matters.

It seems to me that under s. 158 of the Companies (Consolidation) Act, 1908, the liquidator is bound to have regard to the express wishes of the committee of inspection in this matter, and if in his discretion he thinks they are acting unwisely, his course

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no committee of inspection, any act or thing or any direction or permission by this Act authorised or required to be done or given by the

committee may be done or given by the Board of Trade on the application of the liquidator."

is to do what he was entitled to do, to take the opinion of the NEVILLE J. contributories and creditors, under s. 158. I do not think the liquidator was acting properly in going behind the backs of the committee of inspection and obtaining an order ex parte. I am bound to say he was quite candid with regard to the matter, and in the affidavit that he filed he advised the registrar of the fact that the committee of inspection differed from him. I think that order must be discharged. I say nothing about whether or not there is any serious objection to the employment of the solicitors in question in the matters specified.

The applicants must have their costs and the liquidator must pay them.

Solicitors: *Godwin & Son; Goldberg, Barrett & Co.*

J. R. B.

*In re* WASSERBERG.

UNION OF LONDON AND SMITHS BANK,  
LIMITED *v.* WASSERBERG.

[1914 W. 1845.]

*Donatio mortis causa—Bonds to Bearer—Box at Bank—Delivery of Key to Donee—Validity.*

SARGANT J.

1914  
Nov. 3, 4, 16.

An inchoate or imperfect delivery of chattels may be sufficient for effectuating a *donatio mortis causa*. There is no distinction for this purpose between chattels and choses in action.

Testator, who was about to undergo a serious operation, was possessed of certain bonds to bearer in the custody of his bank which he was desirous to give to his wife in the event of his death. He visited his bank and put the bonds in a sealed parcel. He discussed the matter with the assistant manager, to whom he ultimately expressed his intention of putting his wife's name on the outside of the parcel and locking it up in his locked box, so that when his executors opened it they would hand over the parcel to her. This he did in the presence of his wife, who had followed him to the bank, and left the locked box with the bank, still, however, retaining the key, which he showed to his wife in order that she might recognize it, and he also gave her a list of the bonds and told her to keep it safely. They left the bank together, and when they reached their home the testator gave to his wife the bunch of keys containing the key of the locked box, and told her to lock them up with the list of the bonds. Accordingly she,

SARGANT J.

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—

under his direction, locked both the list and the bunch of keys in a drawer in her own room, of which she had and always kept the key. The same day the testator went to a nursing home, where he shortly afterwards died:—

*Held*, that the delivery of the key transferring to the wife a partial dominion over, or part of the means of getting at, the bonds, though not a sufficient delivery to support a gift *inter vivos*, was, under the circumstances, a sufficient delivery to effectuate a *donatio mortis causa*.

## ADJOURNED SUMMONS.

This was an originating summons raising (inter alia) the question whether the testator made an effective *donatio mortis causa* to his wife of certain bonds to bearer of the value of some 19,000*l.*

The following statement of facts is taken from his Lordship's written judgment:—"The facts appear from the affidavits supplemented by a statement or admission which was made to me in the course of the proceedings and in which both the executors and the widow concurred. It seems that the testator, who was worth at his death from 80,000*l.* to 90,000*l.* exclusive of the bearer bonds now in question, kept two boxes of deeds or securities at his bankers, the Holborn branch of the Union of London and Smiths Bank. One box, which I will call the first box, could only be opened by the testator; it is referred to in the affidavits as the locked box; it contained private papers, deeds, and securities, but the bank had no definite knowledge of its contents. The other box, which I will call the second box, contained both bearer bonds and other securities belonging to the testator and could be and was from time to time opened by the bank for the purpose of collecting coupons for the testator; the bank had in their ledger a detailed list of the contents of this box. The testator had been unwell for a long time and had been under a specialist for about six months before his death. He was in fact suffering from cancer, but he was not aware of the fact until about January 19 or 20, 1914, when arrangements had to be made for him to be taken to a nursing home for the purpose of undergoing a serious operation. On Tuesday, January 20, the testator called on the plaintiff Lewis Barnett, informed him of the impending operation, and asked him to act as a trustee of his will; and on the following day the testator discussed with Mr. Lewis Barnett the terms of his will and the provisions to be made for his

relations and for winding up his affairs in the event of the operation ending fatally. At this interview Mr. Lewis Barnett says that the testator stated his intention to give his wife a large sum either in money or in bearer shares so that if he got over the operation she might have ample means to defray all household and general expenses without troubling him, as he intended if and when he was well enough to go to South Africa for at least a year. The testator also called on Mr. Lewis Barnett on the two following days. On the Thursday he stated that he was going to see his solicitors and make his will and that he was also going to his bank to go through his securities and look out the bearer bonds which he was going to give to his wife; and at the call on Friday, which took place at 1 P.M. and at which he was accompanied by his wife, the testator stated that he had been to the bank and had put the bearer securities in an envelope for his wife and had put her name outside. The testator did in fact go to his bank on the Thursday accompanied by a friend of his, a Mr. Klean, and saw the manager, Mr. Langdon, and stated to him that he was about to undergo a serious operation and that he wished to know if he could transfer his bonds to his wife. Mr. Langdon explained to the testator that he could do as he liked with his bonds, but that if he died within three years the bonds would still be liable to death duties, and made the suggestion that the testator might in order to carry out his wishes place the bonds in a sealed parcel addressed to his wife. At some time in the course of that afternoon, but whether before or after the interview with Mr. Langdon does not appear, the testator saw Mr. Thomas, the securities clerk at the bank, and said he was coming on the following morning to take away his bonds.

"On the next day, the Friday, the testator called alone at the bank between 12 and 1 and saw Mr. Watson, the then assistant manager. In anticipation of the visit the second box had been brought up from the bank's strong room and a list of the bearer securities got out from the ledger and entered in the journal. The second box was brought into the room by Mr. Thomas, and the testator signed the journal and was handed the securities. He then asked for and was handed some brown paper, string, and

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SARGANT J. sealing wax, and proceeded to fasten up the securities in the brown paper and to tie up and seal the parcel. The testator then said to Mr. Watson that he was going to deposit the parcel with the bank in the name of his wife, to which Mr. Watson replied that if he did this, then in the event of his operation being successful the parcel could only be removed by his wife, who would be the only person regarded by the bank as having any control of it. The testator said that was not his intention, and after considering for a moment or so added, 'I shall put her name on the outside of the parcel and lock it up in my locked box so that when my executors open it they will hand over the parcel to her.' The testator then wrote on the parcel 'This is the property of Mrs. F. E. Wasserberg' and asked for his locked box—the first box—which was brought to him. Just after this the testator's wife, who had followed him to the bank, came into the room, and the following incident took place between them, namely: The testator showed his wife the parcel and said 'This is yours.' She called his attention to the fact that in the indorsement her initials had been reversed, and he then drew a line through her name on the indorsement and wrote 'Ethel F. Wasserberg' underneath and added his initials. Neither Mr. Watson nor Mr. Thomas was a party to this incident or noticed it. The testator then put the parcel into the first box, locked it, and left it at the bank, retaining the key. He also showed his wife on his bunch of keys which was the key of the first box so that she should recognize it, and he handed a list of the bearer bonds to his wife and told her to keep it safely. The testator and his wife then left the bank and proceeded along Holborn to see Mr. Barnett, and while on the way there the testator told his wife to get the parcel out of the box at the bank and to put it in her own bank, which was another branch at the Swiss Cottage of the same bank. After lunching in the neighbourhood they went back to the testator's office, where he signed his will, and shortly before 4 o'clock they returned to the testator's bank in Holborn, where he asked for the first box, opened it, and placed the will there enclosed in a sealed envelope. They then drove back to their home at Hampstead, and on the way Mrs. Wasserberg said 'We might have brought that

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parcel with us and left it at my bank on the way,' adding 'No, it would be closed.' The testator said the parcel would be all right where it was, that his wife had only to go and ask the manager for it and put it in her bank at some later time. He also said that he did not wish her to take the bearer securities home, probably alluding by this to the fact that they had no safe there.

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"On arriving home the testator told his wife to lock up the list which he had given her of the securities and gave her the bunch of keys containing the key of the first box and told her to lock them up also. Accordingly she under his directions locked both the list and the bunch of keys in a drawer in her own room of which she had and always kept the key. He did not then give her the rest of his keys. They were afterwards given her at the nursing home, as he said he would not be wanting them there. He went to the nursing home that same evening and remained there until his death on the following Wednesday, January 28.

"So far as the above narrative deals with what happened after the testator had fastened up the securities in the brown paper parcel it is founded almost entirely on the evidence of the claimant, Mrs. Wasserberg; but I have no reason to suppose, and indeed it is not suggested, that her evidence is not absolutely trustworthy; it is corroborated in several material particulars, and I have come to the conclusion that I ought to accept it as it stands."

*S. Green (A. Grant, K.C., with him), for the summons.*

*Romer, K.C., and J. G. Wood, for the widow.* There was a complete gift inter vivos of these bonds by the testator to his wife, or, if not a complete gift inter vivos, there was certainly a sufficient donatio mortis causa. The delivery of the key of the locked box in which the bonds were placed was a sufficient delivery for this purpose: *In re Taylor* (1); *In re Mustapha* (2); *In re Dillon* (3); *Duffield v. Elwes*. (4) The delivery of the key is not to be treated as a symbolical delivery of the bonds; it is

(1) (1887) 56 L. J. (Ch.) 597.

(3) (1890) 44 Ch. D. 76.

(2) (1891) 8 Times L. R. 160.

(4) (1827) 1 Bli. (N.S.) 497.

SARGANT J. the actual delivery of the means of getting at the bonds and to that extent taking them out of the hands of the executors :  
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*Martelli, K.C., and W. S. Sherrington*, for persons claiming under the will of the testator. The true inference from the facts is that the testator intended to make a gift to his wife in all events and not merely by way of donatio mortis causa, and it is clear that the facts did not amount to a complete gift inter vivos : *Cochrane v. Moore* (2); but if the testator's intention was to make a donatio mortis causa merely, there was no sufficient delivery to constitute a good donatio mortis causa. The testator did not intend to give the bonds to his wife, but intended that his executors should do so, and that is not enough. In all the cases in which a donatio mortis causa has been upheld there has been a delivery to the donee in some form or other, and in the case of choses in action a delivery of the indicia of title has no doubt been held sufficient, but there is no authority to show that in the case of chattels, such as these bonds, anything short of actual delivery of the bonds themselves will be sufficient. The delivery of the key of the locked box gave the wife no dominion over the bonds, as the bank would have refused to allow her to take possession of the bonds except by the authority of the executors.

[SARGANT J. referred to *Jones v. Selby* (3) and *Hudson v. Spencer.* (4)]

In *Jones v. Selby* (3) the housekeeper to whom the key was given had herself control over the trunk. So in *In re Taylor* (5) the daughter had access to the box. *In re Mustapha* (6) is very shortly reported on this point and is not a satisfactory authority. *Bunn v. Markham* (7) and *Reddel v. Dobree* (8) show that there was no sufficient delivery in the present case. *Cain v. Moon* (9) is distinguishable, as there the donee was in possession of the chattel.

(1) (1752) 2 Ves. Sen. 431; 1 Dick. 170; 1 Wh. & T. (8th ed.) 413.

(2) (1890) 25 Q. B. D. 57.

(3) (1710) Prec. Ch. 300.

(4) [1910] 2 Ch. 285.

(5) 56 L. J. (Ch.) 597.

(6) 8 Times L. R. 160.

(7) (1816) 7 Taunt. 224.

(8) (1839) 10 Sim. 244.

(9) [1896] 2 Q. B. 283.

*J. G. Wood* in reply referred in addition to *Farquharson v. SARGANT J. Cave* (1) and *In re Robson*. (2)

*W. E. B. Henderson* appeared for a person contingently interested under the testator's will, but took no part in the argument.

*Cur. adv. vult.*

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Nov. 16. SARGANT J. delivered the following written judgment:—The first question raised by this summons and the only question on which I have reserved judgment is whether the testator shortly prior to his death made an effective donatio mortis causa to his wife of a number of bearer bonds of the value of some 19,000*l*. [His Lordship stated the facts as above set out and continued:] On these facts the validity of the transaction as a donatio mortis causa has been questioned on two grounds, first, that a gift was intended in all events and not merely in the event of death and that such a gift was not completely effectual; and, secondly, that, even if the intention was merely to make a donatio mortis causa, there was no sufficient delivery to make it effectual even for that purpose.

The first objection was rested mainly on the conversation with Mr. Lewis Barnett on Tuesday, January 20. But I am inclined to think that that conversation did not disclose the whole or even the main object of the testator, but merely recognized an incidental convenience of the proposed arrangement if the testator recovered, and that had this happened the testator's wife would have held the bonds not as her absolute property but as his agent; and, even if this is not a true view of the testator's intention on January 20, I am quite satisfied that he altered that intention in the course of the next day or two, and that later on he had a quite clear and definite intention to provide with these bonds for his wife in the event and in the event only of his death, and that ultimately he meant by means of the delivery of the key to put the bonds at her disposal and under her dominion, though in fact this intention was not fully carried out by reason of the fact that the possession of the key would

(1) (1846) 2 Coll. 356.

(2) [1891] 2 Ch. 559, 562, per Chitty J.



SARGANT J. not have been enough for the bank to act on. The really important question both on the facts of the particular case and in view of the general law is whether there was any sufficient delivery of the bonds to give effect to the intended gift. It is pointed out by Lord Hardwicke in *Ward v. Turner* (1) that donationes mortis causa fall into two classes. There is first the class of cases in which a complete delivery or transfer takes place such as would be sufficient in the case of an ordinary gift, and as in the case of a donatio mortis causa would necessitate a retransfer to the donor should he recover; and there is also as regards some kinds of property at all events a second class of cases in which the transaction is sufficiently effectuated by an inchoate or incomplete delivery or transfer such as would not be sufficient in the case of an ordinary gift and as in the case of an intended donatio mortis causa requiring something further to be done by the legal personal representatives of the donor after his death. And accordingly I have to consider the matter under each of these alternative heads.

On doing so I cannot think that the facts are sufficiently strong in the claimant's favour to bring the case within the first of the above two alternatives. As regards the incident at the bank the case of *Cochrane v. Moore* (2) shows that mere words of gift are not in themselves sufficient, but there must be delivery. If the testator had actually given the parcel to his wife and she had handed it back to him for the purpose of safe custody, that would probably have been enough; but as the facts are I think that the testator did not at any time during that incident part with the custody of the bonds. Again as regards the subsequent delivery of the key I cannot think that this was a sufficient delivery to pass the bonds by way of ordinary gift. It would seem that the delivery of a key might be sufficient if the subject-matter of the gift were bulky goods in a warehouse which could not actually be delivered; but here not only was the subject-matter of the gift eminently portable property, but the delivery of the key did not in itself enable the recipient to get at the bonds, since the bank would not (as the testator must have known at

(1) 2 Ves. Sen. 431; 1 Dick. 170;

(2) 25 Q. B. D. 57.

1 Wh. & T. (8th ed.) 413.

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any rate after his conversation with Mr. Watson) have allowed Mrs. Wasserberg to have access to the box without some further authority from the testator.

As regards the second alternative I am again of opinion that so far as the incident at the bank went there was nothing sufficient to constitute an enforceable donatio mortis causa. Not only was there no complete delivery, but there does not seem to have been any attempt, however inchoate or incomplete, at any delivery at all. There were merely words of gift coupled with a careful indication for future guidance of what the property consisted of, where it was to be found, and how it was to be got at. But on the other hand the handing over of the key later in the day went much further than this. On that occasion there was a transfer to Mrs. Wasserberg of part of the means of getting at the bonds, of a partial dominion over them, and there was of course a corresponding deprivation of the testator's facilities for dealing with them. Was this partial or inchoate delivery or transfer a sufficient delivery to effectuate a donatio mortis causa? In my judgment that question must be answered in the affirmative both on principle and (what is perhaps more important in so anomalous a branch of law as this) on actual authority.

It was urged very strenuously by Mr. Martelli that in the case of chattels, such as these bonds, there must either be complete delivery on the one hand or non-delivery on the other, and that there was no halfway house, such as was recognized by *Duffield v. Elwes* (1) in the case of mortgage debts by means of the delivery of the mortgage deeds, and has since been recognized in the case of moneys on deposit or policies of insurance, amongst other property, by virtue of the delivery of the deposit notes or other indicia of title; but after most careful consideration I see no reason in principle why this should be so. When it is once admitted that any property is a possible subject-matter for a donatio mortis causa—and in fact chattels of all kinds are much more obviously and readily within this category than choses in action—I can see no more reason for declining to give effect to an incomplete or inchoate gift in the case of the one class of property than in the case of the other. The requirement that

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(1) 1 Bli. (N.S.) 497.

SARGANT J. there should be some act towards gift or transfer avoids equally in both classes of property the dangers of attaching to mere nuncupative legacies which were guarded against by the Statute of Frauds, the predecessor in this respect of the Wills Act, 1837; and there is no reason in the nature of things why chattels as well as choses in action should not be in such a position that there should be some physical thing the possession of which should be required in order to get at the property and the transfer of which should accordingly amount to a transfer of the means or part of the means of getting at the property.

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Now as to authority *Jones v. Selby* (1) was a clear decision by the Master of the Rolls that the delivery of the key of a trunk with words of gift of the trunk and its contents was a good *donatio mortis causa* of a Government tally for 500*l.* inside the trunk, although the trunk itself was retained by the donor; and the propriety of this decision in law was approved by Lord Hardwicke in *Ward v. Turner* (2), though the actual decision had been reversed by Lord Cowper because the evidence was not sufficient to show that the tally formed part of the contents of the trunk at the time of the gift. Again in *In re Taylor* (3) the testator in his last illness showed his daughter a deposit note and told her it was to be hers in the event of his death; she placed it by his directions for custody in a cash-box which was kept in his bedroom, but she retained the key. This was held a good *donatio mortis causa* of the money on deposit, and this decision necessarily involved holding that the parting with the possession of the key constituted a sufficient delivery of the contents of the cash-box, since unless the deposit note itself had been sufficiently transferred there could not have been any sufficient transfer of the money represented by it. And again in *In re Mustapha* (4) Mathew J. when sitting in the Chancery Division held the delivery of a key of a wardrobe sufficient to pass for this purpose part of the contents of a safe the key of which was in the wardrobe. In opposition to these express decisions a number of cases were referred to, but I cannot find that any one of them really

(1) Prec. Ch. 300. 1 Wh. & T. (8th ed.) 413.

(2) 2 Ves. Sen. 431; 1 Dick. 170; (3) 56 L. J. (Ch.) 597.

(4) 8 Times L. R. 160.

negated the proposition that an inchoate or imperfect delivery of chattels might be sufficient for the present purpose. In *Hawkins v. Blewitt* (1) Lord Kenyon held that there was no real continuing intention to give, and the key of the trunk whose contents were claimed had been redelivered to the alleged donor before his death. In *Bunn v. Markham* (2) both the key and the box had been retained by the testator; and it may be further remarked that in both the last mentioned cases, as the action was one at law, effect could hardly be given to a donatio mortis causa of the class that is now being considered, where it is sought on the principle developed in *In re Dillon* (3) to complete in equity a gift which is incomplete in law. Turning now to decisions given by the Courts of Equity, *Farquharson v. Cave* (4) and *Powell v. Hellicar* (5) were both cases where delivery was merely to an agent of the donor and was therefore not really a delivery at all. In *Reddel v. Dobree* (6) the donor kept the key of the box in question and was expressly found by the Court to have intended to retain absolute power and dominion over the contents of the box. And in *The Treasury Solicitor v. Lewis* (7) Stirling J. found as a fact that the testatrix did not intend to make a donatio mortis causa at all, but intended that the articles in question should be dealt with as part of the property which she meant to dispose of at her death and over which she meant to reserve dominion during her life. *In re Johnson* (8) again was a case where there was a retention of the key and the learned judge held that there was an intention on the part of the testatrix not to part with dominion over the box. In the present case I think that when the testator handed the key to his wife he intended to part with dominion over the box which I have called the locked box; and it may be incidentally remarked that in both *In re Mustapha* (9) and *In re Johnson* (8), and indeed in all the cases above referred to, extreme importance has always been attached to the possession of the key of any

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(1) (1798) 2 Esp. 663.

(2) 7 Taunt. 224.

(3) 44 Ch. D. 76.

(4) 2 Coll. 356.

(5) (1858) 26 Beav. 261.

(6) 10 Sim. 244.

(7) [1900] 2 Ch. 812.

(8) (1905) 92 L. T. 357.

(9) 8 Times L. R. 160.

SARGANT J. receptacle in which the articles claimed by way of donatio mortis causa may have been placed—a possession which in the present case passed to the widow.

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On the whole, therefore, I have come to the conclusion that there is no such absolute rule as has been contended for, and that the widow, Mrs. Wasserberg, has established her case and is entitled to the bonds in question.

Solicitors: *H. H. Wells & Sons ; Stevens, Son & Parkes ; Ray, Jackman & Falck.*

A. C.

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[1914 A. 603.]

Cinematograph—Exhibition—Projection of Films on Screen for Inspection by intending Purchasers or Hirers—Cinematograph Act, 1909 (9 Edw. 7, c. 30), ss. 1, 7.

The Cinematograph Act, 1909, forbids an exhibition of pictures by means of a cinematograph to be given unless the regulations of the Secretary of State for securing safety are observed, or in any place other than in licensed premises:—

Held, that the showing of films on a screen by dealers or their agents, to intending purchasers or hirers only, does not amount to giving an exhibition within the meaning of the Act.

THIS was an action brought by the Attorney-General on the relation of the London County Council against the defendants for a declaration that a certain display of films by them constituted an exhibition of pictures by means of a cinematograph within the meaning of the Cinematograph Act, 1909, on premises not licensed under the Act and without observing the precautions prescribed by the Act, and for consequential relief.

The defendants were the agents in England for the sale or letting out of cinematograph films manufactured by an American company of the same name. They occupied for the purposes of their business part of the ground floor and basement of a building in Charing Cross Road. They had fitted up in the basement

a room, which they called a projection room, with the apparatus for throwing films on a screen, and with seats; and they advertised in a trade paper that intending purchasers or hirers could see the films in that room on Tuesday and Thursday, January 20 and 22, and at other times by appointment. As a fact they usually displayed films to intending purchasers or hirers twice a week, and sometimes daily. They did not in any way invite the public to see the films on these occasions, and the judge found on the evidence that they took special pains to exclude all persons who were not intending or prospective purchasers or hirers.

The sections of the Act on which the argument turned are set out below. (1)

Sir Charles Macnaghten, K.C., F. F. Daldy, and Claud Mullins, for the Attorney-General. The whole question is whether what the defendants have done is an exhibition of their films within the meaning of the Act.

The words of s. 1 are entirely unlimited and general. There is no mention of entertainment, or of the public. The films are

(1) An Act to make better provision for securing safety at Cinematograph and other Exhibitions (9 Edw. 7, c. 30):—

Sect. 1: "An exhibition of pictures or other optical effects by means of a cinematograph, or other similar apparatus, for the purposes of which inflammable films are used, shall not be given unless the regulations made by the Secretary of State for securing safety are complied with, or, save as otherwise expressly provided by this Act, elsewhere than in premises licensed for the purpose in accordance with the provisions of this Act."

Sect. 2 makes the county council the licensing authority under the Act, and empowers them to grant, renew, and transfer licences and gives them power to charge fees for licences.

Sect. 3 imposes penalties on owners

of cinematographs for using them or allowing them to be used in contravention of the Act.

Sect. 4 gives a right of entry to a constable or other person appointed by a county council at all reasonable times to see that the Act is observed.

Sect. 7 is the exception section.

Sub-s. 1 makes the Lord Chamberlain the licensing authority under the Act for premises which are licensed by him.

Sub-s. 2 provides for premises which are only occasionally used for exhibition purposes.

Sub-s. 3 provides for exhibitions in temporary buildings.

Sub-s. 4 is: "This Act shall not apply to an exhibition given in a private dwelling-house to which the public are not admitted, whether on payment or otherwise."

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ASTBURY J. thrown on the screen in precisely the same way as is done at an ordinary cinematograph palace. The so-called projection room is merely a very small theatre. On the construction of the Act the case is clear, any exhibition by a cinematograph of pictures is forbidden unless the regulations made by the Secretary of State for securing safety are complied with, or, "save as otherwise expressly provided by this Act," elsewhere than in premises licensed for the purpose. The Act does in s. 7 provide for certain exceptions, but does not except any exhibition to customers only. Sub-s. 4 is conclusive on the point. It is: "This Act shall not apply to an exhibition given in a private dwelling-house to which the public are not admitted, whether on payment or otherwise." That shows clearly that, but for that exception, a purely private exhibition in a private house would have been within the Act. The exclusion of the public would not therefore avail the defendants.

But as a fact a certain section of the public are admitted.

It is not suggested that the regulations of the Secretary of State have been complied with. We admit that they are mainly addressed to the safety of an audience, but they could be complied with here. The Act and the regulations are also concerned with the safety of the general public, and this particular place is a source of danger because all the floors of this large building are occupied, and some of them by dealers in these inflammable films who keep large stores of them.

"Exhibit" has no technical legal meaning: *Reg. v. Webb*. (1) The Court will follow the rule stated by Lord Macnaghten in *Pietermaritzburg Corporation v. Natal Land and Colonization Co.* (2), that "in the construction of a statute, the ordinary meaning of the words used must be adhered to unless that meaning is at variance with the intention of the Legislature to be collected from the statute itself, or leads to some absurdity or repugnance."

We do not accuse the defendants of any carelessness in the management of their cinematograph, or the storage of their films, but the London County Council want the general principle decided.

(1) (1848) 2 Car. & K. 933.

(2) (1888) 13 App. Cas. 478, 488.

Younger, K.C., and *A. Neilson*, for the defendants. If the intention of the Legislature was to protect the general public from the danger of fire they have singularly failed to do so. No one could contend that it would be an exhibition if the defendants put a film through the machine when no one was there. But except to the audience the danger would be exactly the same.

“Exhibition” in its common use means public exhibition, and that is the plain meaning here. The Act has only been before the Court once in *London County Council v. Bermondsey Bioscope Co.* (1) The question was whether the London County Council could make their licence subject to a condition that the place should not open on Sundays, Good Friday, or Christmas Day. It was held that they could, and *Avory J.* in his judgment says the condition was only that the licensee should “obey the general law regulating places of entertainment.” The plaintiffs’ argument would make “exhibition” include demonstration or rehearsal, which it does not naturally do. The whole of the provisions of the Act and of the rules of the Secretary of State therein referred to are directed to the safety of the audience at an exhibition of the films for the entertainment of the public. If the Act is to be extended to a private display to purchasers it will put a prohibitive fetter upon a large and increasing trade. There is no way in which a film can be shown to a purchaser or hirer except by throwing it on a screen. The practice was common at the time the Act was passed and the Act was passed on the report of a special committee of inquiry. If it had been intended to stop this well known practice it would have been done by apt words.

Sir Charles Macnaghten, K.C., in reply. The regulations cannot be looked at for the purpose of construing the Act.

ASTBURY J. This is an action by the Attorney-General, at the relation of the London County Council, against a firm of cinematograph film dealers, who carry on business at Charing Cross Road. The object of the action is to obtain a declaration as to the effect of the Cinematograph Act of 1909 in the following circumstances.

(1) [1911] 1 K. B. 445, 454.

ASTBURY J. It appears that prior to the date of this Act, and subsequently, makers of and dealers in these films have been in the habit of running the films through the apparatus for the purpose of showing them to customers, intending customers or prospective customers, in what are called in the trade projection rooms. There is this unquestionable peculiarity about a cinematograph film, that a person intending to hire or purchase it is unable to see what he is purchasing or hiring unless the film is run through the machine and in that sense exhibited. This practice appears to have grown to a considerable extent, and I understand that there are conflicting decisions by magistrates in the country as to whether the Act applies or not to these performances, exhibitions, or whatever they ought to be called, for the purposes of sale or hire; and the London County Council have brought this action against a firm, against whom no allegations of impropriety of any kind are made, for the purpose of obtaining a decision upon the matter.

Now, the statute at first sight undoubtedly would seem to include any exhibition of a cinematograph film, providing it is inflammable, s. 1 being in extremely wide terms, [his Lordship read that section and continued:] and it is suggested that these demonstrations which are made by the defendants and others for the purpose of selling and renting their films are exhibitions within the meaning of this section.

The particular exhibition or performance which has been proved in evidence in this case was on January 20 last, when the defendants did the act complained of in pursuance of an advertisement which they had inserted in a trade paper called the *Bioscope*, and I have no doubt in others, advertising their films and stating that they would be shown in their projection rooms on Tuesday and Thursday, January 20 and 22, and on other dates by appointment; and it is plain from the evidence that the defendants have two classes of customers, purchasers and renters, and they have these bi-weekly or I think sometimes daily performances in the basement of the premises in which they carry on their business, for the purpose of showing to their customers or prospective customers the articles that they are offering for sale or hire. Care is taken at these performances

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to exclude any member of the public who is not a trade customer or a prospective trade customer, and apparently this or some similar means is the only way in which the defendants can show and dispose of their wares.

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The question, and I think the only question, in the action is whether the word "exhibition" in s. 1 of the statute ought to be construed to include such a performance, demonstration, or exhibition as takes place in the circumstances of selling or hiring that I have referred to.

The object of the Act I think is plainly to protect the public at cinematograph exhibitions. Provision is made that the county council may grant licences, to such persons as they think fit, to use the premises specified in the licence for the purposes aforesaid; that is, for the purpose of cinematograph exhibitions. Provisions are made for penalties in the event of improper use of cinematograph apparatus, and in s. 7 of the Act it is provided that, where premises are licensed by the Lord Chamberlain, then the powers of the county council in respect of such premises shall be exercised by him instead of by the county council, and provision is then made that where the premises in which it is proposed to give such an exhibition are used occasionally and casually only, and not more than six days in any one calendar year, it shall not be necessary to obtain a licence for the premises, if the other provisions of the Act are complied with; and in sub-s. 4 of s. 7, which the plaintiffs' counsel particularly relies upon, it is provided that "this Act shall not apply to an exhibition given in a private dwelling-house to which the public are not admitted, whether on payment or otherwise"; and it is contended from that, and not unnaturally, that the word "exhibition" in this Act must be held to apply to an exhibition of a cinematograph film on occasions when the public are not present.

Certain regulations have been made under the Act which, although I think they are not effective for the purpose of construing or altering the Act in any way, do certainly show that the framer of the regulations was dealing substantially with theatres and public places of entertainment where these cinematograph exhibitions are given. Lord Macnaghten, in the

ASTBURY J. passage which is so often cited in *Pietermaritzburg Corporation v. Natal Land and Colonization Co.* (1), refers to the rule that, "In the construction of a statute, the ordinary meaning of the words used must be adhered to unless that meaning is at variance with the intention of the Legislature to be collected from the statute itself, or leads to some absurdity or repugnance." In order for the plaintiff to succeed, I think he must be entitled to include in the word "exhibition" any running of a cinematograph film through the machine in the presence of any other person or persons. Now, when a film is first made, it may be, and indeed I think it is, necessary for the manufacturers or the dealers who are proposing to deal with it to run it through the machine for the purpose of seeing whether in fact the film is a satisfactory one and free from flaws and things of that kind, and it is perfectly clear, I think, that some limitation must be put upon the word "exhibition," otherwise the Act would lead to what I think would be an absurdity and a repugnancy. It is intituled "An Act to make better provision for securing safety at Cinematograph and other Exhibitions." It is perfectly obvious that it cannot have been intended to apply to a factory or warehouse of the manufacturer or dealer, in the case of his merely running the films through a machine for the purpose of seeing whether they were satisfactory before putting them upon the market; so that I think some restriction must be put upon the word "exhibition." What the defendants are doing is this: in order to sell and let their wares, they arrange to run their films through their machine at their place of business, in the basement, for those whom they bona fide believe to be customers or prospective customers. I have heard the defendants' secretary in the box, and have no doubt that reasonable precautions are taken for the purpose of preventing any person being present at these performances, or exhibitions of the films, other than those whom they either know to be past customers, or believe to be future customers, and I only propose in this case to deal with the case where a film is shown by the maker or dealer to purchasers or prospective purchasers in the bona fide exercise of their trade of selling or renting out films.

Taking the statute by itself, and with no other assistance, I think it is clear that it aims at the safety of the public at what are popularly known as cinematograph exhibitions. It provides for the place of exhibition being licensed, as in the case of theatres; it provides for constables and other officers duly appointed having powers to enter into the premises to see that they are being properly conducted. It makes provision for the temporary use for similar purposes of premises which are not habitually so used, and it exempts from the Act an exhibition in a private dwelling-house to which the public are not admitted. Having regard to the fact, if I am right, that there must be some limitation put upon the word "exhibition," and that it cannot possibly be held to include every occasion on which a film is run through a cinematograph machine, I think that I ought to construe the Act as referring to places of public entertainment where an exhibition of a cinematograph picture takes place, and that I ought not to construe it as including a case where a dealer such as the defendants bona fide, in the exercise of his trade of selling and renting, for this purpose only runs his films through his machine, in the presence of one or more customers.

I do not intend to discuss what might happen to such a place of business as the defendants' if proper and reasonable precautions were not taken to prevent them being public exhibitions within the meaning of the Act; but, for the reasons that I have stated, I think the statute does not apply to such performances as take place on the defendants' premises, and the result is that the action must be dismissed.

Solicitors: *Edward Tanner; Crowders, Vizard, Oldham & Co.*

J. R. B.

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[1913 G. 623.]

Registry Acts—Yorkshire—Land settled in Trust for Sale—Conversion—Mortgage of Proceeds of Sale—Registrability—Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), ss. 4, 14.

A mortgage of an interest in the proceeds of sale under an imperative trust for sale of land in Yorkshire is not registrable under the Yorkshire Registries Act, 1884, and consequently the priorities of successive mortgages are determined by the dates of notices to the trustees.

Principle of *Arden v. Arden* (1885) 29 Ch. D. 702 applied.

By a settlement of September 9, 1885, freehold land in Yorkshire was conveyed to trustees upon trust to sell the same and hold the proceeds of sale upon trust for B. for life and after her death for C. absolutely. The settlement contained a power to postpone the sale, a trust in the meantime to hold the property upon such trusts as should correspond with the trusts thereinbefore declared concerning the trust funds, and a power to manage the real estate. The settlement was registered in Yorkshire:—

Held, that the trust for sale was imperative and effected an immediate conversion of the realty into personalty.

In 1892 C. borrowed money on mortgage of her reversion; the mortgagees gave notice of their mortgage to the trustees of the settlement, but did not register it under the Yorkshire Registries Act, 1884. In 1895 C. borrowed a further sum on the security of the land, which was still undisposed of. This mortgage and a transfer thereof to L. were registered at Wakefield:—

Held (affirming the decision of Astbury J. [1914] 2 Ch. 219), that mortgages of proceeds of sale under an imperative trust for sale did not require registration, and that the mortgage of 1892 had priority over that of 1895.

APPEAL from a decision of Astbury J. (1)

On April 23, 1885, John Baxandall, of Plevna Terrace, Bingley, Yorkshire, died intestate leaving his widow Martha Baxandall and his only child, the defendant Emily Crowther, wife of Tom Crowther, of 122, City Road, Bradford, him surviving.

(1) [1914] 2 Ch. 219. The last sentence of the head-note to the report of this case in the Court below should read as follows: "so that the plaintiffs' mortgage was not

registrable in respect of the house and consequently no priority was acquired by the registration of the subsequent mortgage."

By a settlement made September 9, 1885, between the widow of the first part, the defendant Emily Crowther of the second part, and Tom Crowther and Samuel Lund of the third part, reciting that John Baxandall died intestate seised of and entitled to freehold hereditaments situate at Plevna Terrace and certain personal estate, and that the widow was entitled to dower out of the said hereditaments and that the widow and the defendant Emily Crowther were desirous of settling the said hereditaments and personal estate, it was witnessed that the widow and the defendant Emily Crowther conveyed and assigned all the freehold hereditaments and real estate and all the personal estate and effects whatsoever and wheresoever, whether thereinbefore specified or referred to or not, to which the said John Baxandall was at the time of his death seised or entitled, as to the real estate unto and to the use of the trustees, their heirs and assigns, free from the widow's dower, and as to the personal estate unto the trustees, their executors, administrators and assigns, "Upon trust that the said Tom Crowther and Samuel Lund or the survivor of them or the executors or administrators of such survivor their or his assigns (hereinafter called 'the said trustees or trustee') shall (and in order to facilitate the execution of this present trust they or he are and is expressly empowered to) absolutely sell and dispose of so much of the said premises as consists of real estate by public auction or private contract for the best price or prices that can reasonably be obtained for the same with power to buy in at any auction or rescind any private contract for sale thereof and to resell without being responsible for any loss which may be occasioned thereby and to do and execute all such acts and assurances for effectuating any such sale as the said trustees or trustee shall think fit And it is hereby declared (but without prejudice to the auxiliary power of sale hereinbefore expressed to be hereby given) that on the sale thereof as aforesaid by any persons or person who shall not be seised of the legal estate in the property sold the person or persons in whom such legal estate shall be for the time being vested shall and will do and execute all such acts and assurances for effectuating such sale as the persons or person by whom such sale shall be made shall direct"; and upon further trust that the trustees should convert into money the personal

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C. A. estate (except household furniture and effects which were to be
 1914 held in trust for the widow absolutely) and should hold the
 GRESHAM moneys to arise by such sale and conversion of the real and per-
 LIFE sonal estate, after paying thereout John Baxandall's debts, funeral
 ASSURANCE and administration expenses and duties, upon trust to invest the
 SOCIETY same in the securities therein mentioned and to hold the moneys
 v. and securities (thereinafter called the trust fund) upon trust to
 CROWTHER. pay the interest, dividend, and annual produce thereof to the
 widow for life, and after her decease as to the capital and income
 of the trust fund upon trust for the defendant Emily Crowther
 absolutely.

The settlement also contained the following clause: "Pro-
 vided always and it is hereby declared that the said trustees
 or trustee may postpone the sale hereinbefore directed of
 so much of the premises hereinbefore expressed to be hereby
 granted and assigned as consists of real estate for so long a
 period as they or he shall think fit and shall not incur any
 liability by reason of such postponement And also that whilst
 such real estate shall continue unsold the same shall be held
 by the said Tom Crowther and Samuel Lund or the survivor
 of them his heirs or their or his assigns Upon such trusts
 as shall as nearly as the nature of the property will admit
 correspond with the trusts hereinbefore declared concerning
 he said trust fund And the said trustees or trustee shall
 nave and exercise all powers of managing the said real estate
 which shall be necessary for obtaining the full benefit thereof."

This settlement was registered at Wakefield on October 24,
 1885, under the Yorkshire Registries Act, 1884.

By a mortgage made January 11, 1892, between the defendant
 Emily Crowther of the one part and the plaintiffs of the other
 part, reciting the death of John Baxandall and the settlement of
 September 9, 1885, it was witnessed that in consideration of the
 sum of 300*l.* paid by the plaintiffs to the defendant Emily
 Crowther the defendant Emily Crowther covenanted to pay the
 plaintiffs on July 11, 1892, the sum of 300*l.* with interest in the
 meantime at 6*l.* per cent. per annum, and also that in case the said
 sum of 300*l.* should not be then paid the plaintiffs should be at
 liberty to accumulate and retain interest at the rate aforesaid

upon the said sum or such part thereof as should for the time being remain unpaid, and the defendant Emily Crowther as beneficial owner conveyed and assigned to the plaintiffs all and singular her part share and interest of and in the thereinbefore recited hereditaments, real estate, and personal estate and effects to which she was entitled under and by virtue of the recited settlement and the proceeds thereof, and of and in all and any the stocks, funds, and securities in or upon or of which the same or any part thereof might be invested or consist or by which the same might be represented, howsoever the same respectively might be invested, circumstanced, secured, or described, and the income and accumulations thereof respectively subject to redemption and reconveyance on payment of the principal and other moneys thereby secured.

The interest was reducible to 5 per cent. on punctual payment. It was paid up to January 11, 1895, after which it was left to accumulate at 6 per cent.

This mortgage was not registered, but notice was given to the trustees on January 14, 1892.

On January 1, 1895, the defendant Emily Crowther mortgaged her reversion in the land, which was still unsold, to a mortgagee, who on June 3, 1897, transferred it to a transferee, who on July 25, 1903, conveyed it under his power of sale to the defendant Sarah Lister subject to the widow's life estate under the settlement. The mortgage, transfer, and conveyance were respectively registered at Wakefield on January 7, 1895, October 12, 1900, and July 29, 1903, and were admittedly taken after proper search in the registry and without any notice of the plaintiffs' mortgage. Notices were also sent to the trustees, but these notices were of course later than the plaintiffs' notice.

On October 21, 1912, the widow died intestate and the reversionary interest of the defendant Emily Crowther under the settlement fell into possession.

On April 10, 1913, the plaintiffs brought this action for an account and foreclosure or sale, and a declaration (inter alia) that their security upon the land or the proceeds of sale thereof had priority over the claims of the defendant Sarah Lister.

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Astbury J. held that the mortgage of 1892 did not require registration and had priority over the subsequent mortgage.

Sarah Lister appealed.

Percy F. Wheeler, for the appellant. Two questions arise on this appeal, namely, first, whether or not on the terms of the settlement the trust for sale was imperative so as to effect a conversion of the real estate into personalty, and, secondly, if the trust was imperative, whether a mortgage of the proceeds of sale required registration under the Yorkshire Registries Act, 1884, ss. 4 and 14.(1) The appellant contends that the settlement contains merely a discretionary power of sale and there was no conversion. The property continued to be real estate, the plaintiffs' mortgage ought to have been registered, and, as it was not, it must be postponed to the second mortgage. To convert real estate into personalty the character of personalty must be imperatively affixed to it: *Wheldale v. Partridge* (2); *Walker v. Denne*.(3) Here there was a power to postpone the sale for so long a period as the trustees should think fit, but we do not contend that that provision would of itself be sufficient to prevent conversion. We rely on the clause which provides that whilst

(1) The Yorkshire Registries Act, 1884, provides as follows:—

Sect. 4. "From and after the commencement of this Act . . . all assurances executed or made after the commencement of this Act . . . by which any lands within any of the three ridings are affected may be registered under this Act."

Sect. 14. "Subject to the provisions of this Act, all assurances entitled to be registered under this Act shall have priority according to the date of registration thereof, and not according to the date of such assurances, or of the execution thereof. . . . All priorities given by this Act shall have full effect in all Courts, except in cases of actual fraud, and all persons claiming thereunder any legal or equitable

interests shall be entitled to corresponding priorities, and no such person shall lose any such priority merely in consequence of his having been affected with actual or constructive notice, except in cases of actual fraud; but nothing in this section contained shall operate to confer upon any person claiming without valuable consideration under any person any further priority or protection than would belong to the person under whom he claims; and any disposition of land or charge on land, which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner."

(2) (1800) 5 Ves. 388; (1803) 8 Ves. 227.

(3) (1793) 2 Ves. Jun. 170.

the property is unsold it is to be held on such trusts as shall correspond with the trusts of the trust fund and the trustees are to have power to manage the real estate. These words show that the intention of the parties was that there might never be a conversion: *In re Hotchkys* (1); *In re Newbould*. (2) The usual form of power to postpone sale is given in Key and Elphinstone's *Precedents in Conveyancing*, 10th ed. vol. ii. p. 872. The direction as to income of unsold property is inserted in order to avoid the operation of the rule in *Howe v. Earl Dartmouth*. (3) On the construction of the language of this settlement it is submitted that this was a discretionary power of sale and there was no conversion: *In re Raw*. (4)

Hon. Frank Russell, K.C., and *Simpkin*, for the plaintiffs, were not called upon to argue.

LORD COZENS-HARDY M.R. The general principle applicable to this case is not open to doubt. We must look at the whole instrument, not at one clause only, and see whether there is that which amounts to an imperative direction to sell, although there may be power to postpone in the widest terms and although it may require the consent of somebody else. Mr. Wheeler, in his argument, very fairly concedes that but for the final clause in this deed he could not resist the contention that there was an imperative trust for sale. The deed is a deed between the widow and her only child, the widow being entitled to dower and the child being entitled as heiress-at-law; between them they are entitled to the personal estate, and they convey all the real estate of the intestate and the personalty too to two trustees upon trust to sell and dispose of it by public sale or auction, and then there is an unintelligible direction which contemplates that there might be somebody entitled to vest the legal estate in whom the power of sale would not be vested, but it is unnecessary to consider that. Then there is a clear declaration of trust as to what is to be done with the proceeds of sale. They are to be applied to pay the debts and funeral expenses and expenses of administration and the trustees are to invest the residue in certain securities which are

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(1) (1886) 32 Ch. D. 408.

(2) (1913) 110 L. T. 6.

(3) (1802) 7 Ves. 137 a.

(4) (1884) 26 Ch. D. 601.

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there mentioned, and the trustees are to hold the residue of the money to arise by such a sale upon trust to pay the interest, dividends, and annual produce thereof to the widow for life, and after her decease as to the capital and income of the trust fund upon trust for the daughter absolutely. It is quite plain that thus far there was an imperative direction for sale. Then comes a common form to authorize postponement of the sale, declaring that the trustees might postpone the sale of so much of the premises as consisted of real estate for so long a period as they should think fit. That postponement clause, as Mr. Wheeler inevitably admits, would not prevent the trust for sale from being absolute. Then it goes on that whilst the real estate should continue unsold it should be held by the trustees upon such trusts as should as nearly as the nature of the property would admit correspond with the trusts thereinbefore declared concerning the trust fund. That is all, except that there is power to manage the unsold real estate. Mr. Wheeler's argument really turns upon the words "upon such trusts as shall as nearly as the nature of the property will admit correspond with the trusts hereinbefore declared concerning the said trust fund." He says that that contemplates that there may be unsold real estate at the death of the two beneficiaries, certainly at the death of the widow, and possibly of the daughter also, and that the clause is in effect a declaration that it shall be held as real estate upon trusts corresponding with those of the personal estate. I think that is a very slender scaffold upon which to build such an argument. No authority which Mr. Wheeler has cited seems to me to bear that out. *Wheldale v. Partridge* (1), which was a decision of Lord Eldon, is very far from bearing out any such contention. I do not propose to go through the clause in that deed, but it was a most extraordinary document: in the event of the money being held under the trusts the beneficial interests were to go in a different direction. It was therefore very difficult to say that that could be an imperative trust for the purchase of land, because the deed contemplated a disposition in one way if there was a purchase and in another way if there was not. That being so, it seems to follow that there was not an imperative

trust for purchase of land, and I do not think it is doing justice to the very eminent judges who decided that case to say that they decided it upon one or two words in the final clause rather than on the scope of the whole instrument. Taking the scope of the whole of this instrument I think that the learned judge was right in saying that there was an imperative trust for sale.

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KENNEDY L.J. I agree.

SWINFEN EADY L.J. I am of the same opinion. The question is whether there is an imperative trust for sale. A direction to convert money into land, or land into money, must be express and imperative to work a conversion. If the direction to convert be merely optional, then the property will be considered as real or personal according to the actual condition in which it is found. It is conceded that but for the last clause in this settlement there would be nothing to argue: the trustees were to absolutely sell with a power to postpone. If that were all it would be unarguable. In my opinion the subsequent direction as to what is to happen whilst the estate shall continue unsold, which is directory, does not in any way cut down the imperative nature of the trust. For these reasons I am of opinion that according to the true construction of this settlement it must be treated as an absolute trust for sale, an imperative direction to convert.

Percy F. Wheeler, for the appellant. The second question is whether, where land in Yorkshire is settled on an imperative trust for sale, the deed which settles it, and mortgages of the proceeds of sale of it, ought to be registered in Yorkshire, and it is submitted that they ought to be. By s. 3 of the Yorkshire Registries Act, 1884, 'The expression 'land' includes land and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, and also an undivided share in land.' The mortgage clearly affected the land within s. 4 and created an equitable interest within s. 14. Emily Crowther had an "interest" in the land and she was dealing with it; therefore the mortgage ought to have

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been registered under s. 14. *Arden v. Arden* (1) was relied on by Astbury J., but it was a decision under the Middlesex Registry Act, 1708, and does not apply to the Yorkshire Registries Act, 1884. It was based on *Malcolm v. Charlesworth* (2), a decision which is open to question: Davidson's Precedents in Conveyancing, 4th ed. vol. ii. pt. ii. p. 219; Dart on Vendors and Purchasers, 7th ed. p. 700; Coote's Law of Mortgages, 8th ed. p. 1271; Cyprian Williams on Vendor and Purchaser, 2nd ed. p. 379. *Arden v. Arden* (1) has always been doubted and has never been followed in practice. A legacy charged on land is not in the same position as a mortgage; the only right of the legatee is to get the money out of the land. He cannot elect to take the land as realty or personalty, as Miss Crowther and her mother, or Miss Crowther alone after her mother's death, might have done. That shows that the mortgage affected the land. It is included in the definition of the expression "conveyance" given in s. 3 of the Act. *Arden v. Arden* (1) has no application to questions under the Yorkshire Registries Act. In *Rodger v. Harrison* (3) Lord Esher M.R. said that *Credland v. Potter* (4), a decision on the construction of the West Riding Registry Act, 1703, was no authority on the construction of this Act. The principle of *Arden v. Arden* (1) is inconsistent with other authorities and ought not to be followed. For instance, the plaintiffs' mortgage would clearly have affected the land within the meaning of the Mortmain Act, 1736: *Attorney-General v. Harley* (5); *Brook v. Badley*. (6) A mortgagor's interest in the proceeds of sale of land held on trust for sale is an interest in land within the Real Property Limitation Act, 1833, s. 1: *In re Fox*. (7) A gift of income of proceeds of sale of land is a gift of an interest in land within the Dower Act, 1833: *In re Thomas*. (8) [He also referred to *Citizens' Bank of Louisiana v. First National Bank of New Orleans*. (9)]

Hon. Frank Russell, K.C., and *Simpkin*, for the plaintiffs, were not called upon to argue.

(1) 29 Ch. D. 702.

(2) (1836) 1 Keen, 63.

(3) [1893] 1 Q. B. 161, 167.

(4) (1874) L. R. 10 Ch. 8.

(5) (1821) 5 Madd. 321.

(6) (1868) L. R. 3 Ch. 672.

(7) [1913] 2 Ch. 75.

(8) (1886) 34 Ch. D. 166.

(9) (1873) L. R. 6 H. L. 352.

LORD COZENS-HARDY M.R. This is an appeal from a decision of Astbury J. and it raises a point which no doubt may be important under the Yorkshire Registries Act. We have held that under the deed in question there was an absolute trust for sale and that the property was converted notionally into money. The beneficiaries were the widow, who was tenant for life, and the daughter, who was absolutely entitled on her death. During the lifetime of the widow a mortgage was executed by the daughter in favour of the plaintiffs. What had the lady to mortgage? All she had to mortgage was her interest in the proceeds of sale. What is the method approved by the law of the land for protecting the interests of a mortgagee with such a person? To give notice to the trustees. That was done by the plaintiffs here, and a good title was undoubtedly acquired by the plaintiffs unless it be true that a mortgage of that character requires to be put upon the registry. The present appellant is subsequent in time to the Gresham Life Assurance Society. Her transferors took a mortgage; they did give notice to the trustees, but that notice was subsequent to the plaintiffs'. They also put their deed upon the registry, and the question under those circumstances is, who is entitled to priority? Looking at the matter apart from authority, what was the position of the daughter, Emily Crowther? She could not in any way interfere with the positive trust for sale vested in the trustees. The transaction in question took place in 1892 in the lifetime of the mother, the tenant for life, and it seems to me, although an ingenious argument, one which will not bear looking at for a moment, that the deed ought to have been registered because at some future time, after the mother's death, Emily Crowther might have elected to take the land as land. She could not do it alone. I do not suppose for a moment that her future contingent hypothetical right, such as that which Mr. Wheeler relied upon, ought to be considered here. I think it would be contrary to the policy of the Act to say that trustees who have an absolute trust for sale have anything to do with dealings with the beneficial interest of persons under the trust for sale. It is not, as it seems to me, within the mischief of the Act, and apart from authority I should have come to the same conclusion, but

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I really cannot approach the matter in that view. Nearly eighty years ago Lord Langdale, in the case of *Malcolm v. Charlesworth* (1) in 1836, laid down a principle which seems to me possibly to go further than the present case, at all events it is a decision which has never been impugned by any Court so far as I am aware. He says (2): "The only question is, whether the land situate in the county of York—for the argument cannot possibly be extended to the land in Leicestershire—is to be considered as affected by an assignment of a legacy charged upon the land. It appears to me that the deed under which the plaintiff claims is not a deed which affects the land; it is an assignment of the money charged upon the land, and of the money only; and if I were to hold that an instrument assigning money charged upon land situate in a register county required registration, I should lay down a rule which certainly has not hitherto been adopted." It may be said that that was a bold decision, and I am disposed to think that it is not quite clear that the concurrence of the plaintiff might not have been required to make a title. In the present case it is quite clear that the concurrence of the plaintiffs, the mortgagees, was not and would not be required to make a title. They would not have been properly inserted on the abstract of title. That case came before Kay J. in *Arden v. Arden* (3) in 1885, that is to say, thirty years ago. He discussed the matter fully; he expressed his approval of *Malcolm v. Charlesworth* (1), and in dealing with the case before him, the facts of which are identical with the present one, namely, an interest in a share of the proceeds of sale of the property directed to be sold, he held that that was not within the terms or the mischief of the Act. It is true that that was in the Middlesex Registry, but I do not think that anything turns upon the language of one statute rather than upon that of another. In substance we are asked to overrule the decision of Lord Langdale, which is eighty years old, and the decision of Kay J., which is thirty years old, decisions which, though some slight doubt has been expressed by very cautious conveyancers, have never been impugned by any judge. We ought to

(1) 1 Keen, 63.

(2) 1 Keen, 72.

(3) 29 Ch. D. 702.

hesitate long before we give a decision which might have the effect of destroying titles and securities which have been accepted and dealt with on the footing of the registration of deeds of this kind, unless it were absolutely necessary to do so. In my opinion, the decision of the learned judge on this point was right, and the appeal must be dismissed with the usual consequences.

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KENNEDY L.J. I am of the same opinion. With regard to the cases cited in *Arden v. Arden* (1), Kay J. followed the decision in *Malcolm v. Charlesworth* (2), a decision which was an authority for him in deciding as he did. In *Malcolm v. Charlesworth* (2) the legacy was charged upon land in Yorkshire. Kay J. in *Arden v. Arden* (1) was dealing with the case of an interest in a share of the proceeds of sale of real estate in Middlesex. He was of opinion that, although the forms were not identical, there was no difference between the Acts which in any way prevented his treating the decision on the Yorkshire Registries Act at that time as a good authority in construing the language of the Act relating to the Middlesex Registry. He said: "The words of the Act are: All deeds and conveyances whereby any hereditaments in the said county 'may be any way affected in law or equity.'" It seems to me that both these two decisions as to the meaning of the terms used in those two Acts of Parliament were right, and that the learned judge in the present case not only was entitled but was practically bound to hold as he did, that *Arden v. Arden* (1) was applicable to a case on the Yorkshire Registries Act.

SWINFEN EADY L.J. The question is whether a dealing with a share or interest in proceeds of sale of land in Yorkshire, conveyed upon an absolute trust for sale, requires registration under the Yorkshire Registries Act of 1884. Under that Act, by s. 4, all assurances "by which any lands within any of the three ridings are affected may be registered under this Act," and then by s. 14 all assurances entitled to be registered are to have priority according to the date of registration. It is clear from the rest of s. 14 that assurances of equitable as well

(1) 29 Ch. D. 702, 707.

(2) 1 Keen, 63.

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as legal interests are within the Act. The question is whether an assurance of a share of the proceeds of sale of the land is within the Act. Land is defined thus: "The expression 'land' includes land and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, and also an undivided share in land," and "The expression 'conveyance' includes any assignment" and so on, by which "any interest in such land is thereby conveyed." The question is whether a share or interest in the proceeds of sale of land is an interest in land within the meaning of the Act. It is quite clear, as Mr. Wheeler has urged, that it may be and is for many statutes and for many purposes an interest in land; for instance, money to arise from the sale of real estate so far partakes of the nature of realty, that is to say, it is so far an interest in land that under the old law it could not be the subject of a bequest to a charity which was within the Mortmain Act. So again, it might be an interest in land within the Dower Act or within the Statute of Limitations. The question is whether it is an interest in land within the meaning of the Yorkshire Registries Act. In my opinion this statute is intended to apply to dealings both at law and in equity which affect the land itself. In the present case the trustees for sale could make a good title quite independent of and without the concurrence of the persons interested in the proceeds or entitled to any share in the proceeds of sale, or their mortgagees; and a person entitled to a share in the proceeds of the land had, in my opinion, no interest in the land itself within the meaning of this statute. Mr. Wheeler urged that it was within the mischief of the statute. I do not think it is. Where persons are entitled to an interest in the proceeds of sale of land, the land is vested, as here, in trustees for sale, and the trustees for sale hold the proceeds after the sale in trust for the cestuis que trust, and if any cestui que trust chooses to assign or mortgage or incumber his interest there is a well-known method, that is, by giving notice to the trustees, by which priority is secured. The mortgagee's position is thus secured, and, if due inquiry is made of the trustees before a sale or mortgage, the position is ascertained, and information can be gained as to whether the vendor or

incumbrancer has previously sold or dealt with the interest which the trustees hold in trust. To guard against the mischief of fraudulent dealings where money is held by trustees there always may be inquiry of the trustees. Where simple interests in land are being dealt with, the same observations do not apply. In the case of a first mortgage the first mortgagee would take the deeds, but in effecting subsequent incumbrances, in the absence of any registry there is a difficulty in ascertaining whether or not prior incumbrances exist, and opportunity for committing frauds arises in the absence of the registry. Those observations only apply to the dealings with the land itself and not to any proceeds which are held on trust by trustees. In my opinion, the interest in question in this proceeding is not an interest in land within the meaning of the Act, nor is it within the mischief of the Act, and no entry on the registry could secure for it any priority over a prior incumbrancer who had given notice to the trustees.

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Appeal dismissed.

Solicitors : *Jaques & Co., for Massey & Co., Bradford ; Devonshire, Monkland & Co.*

H. C. R.

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Nov. 25.

In re HEWITT'S SETTLEMENT.HEWITT *v.* HEWITT.

[1914 H. 2373.]

Trustee—Public Trustee—Marriage Contract—Scotch Form—Foreign Settlement—Matrimonial Domicil—English Husband and Scotch Wife—Trustees, Beneficiaries, and Securities all English—Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 5; s. 17, sub-s. 2.

It is not competent to the Public Trustee to accept the trusteeship of any settlement other than an English one.

Where, therefore, the trustees of a marriage contract, which, when executed, was in form and substance a Scotch settlement, desired to appoint the Public Trustee to be sole trustee of the settlement, on the ground that the matrimonial domicil, the present trustees, the beneficiaries, and the trust investments were all English:—

Held, that the settlement still remained a Scotch settlement to be construed according to Scotch law, and there was no statutory power enabling the Public Trustee to accept the trusteeship of what was a foreign settlement.

By an ante-nuptial contract of marriage in Scotch form, dated June 4, 1890 (and registered in Edinburgh on June 19, 1890), made between Harry Morse Hewitt, of the first part, Rachel Jessie Ford, of the second part, Ernest Ford (her father), who still retained his domicil in Scotland, of the third part, and the four trustees of her father and mother's marriage contract, of the fourth part, in contemplation of marriage, and for the consideration thereafter made in his favour, H. M. Hewitt assigned, conveyed, and made over to John Humphrey Ward, Robert Beatson, George Southby Hewitt, and Edgar Farman, "as trustees, and the survivors or survivor, acceptors or acceptor of them, and to such other person or persons as may be assumed by them or him into the trust, and the nearest heir male of the last survivor who shall be major and resident within Great Britain at the time" (all thereafter referred to as "the said trustees"), first, the whole household furniture and plenishing, including plate, china, books, &c., belonging to him the said H. M. Hewitt, to be held upon the trusts therein mentioned; second, a policy of assurance with the Mutual Life Assurance Society for 1000*l.* to be held by the said trustees

upon the trust therein mentioned for the benefit of the spouses and the children of the marriage, or issue of children, and in the event of the wife being the survivor of the spouses, and there being no children, or issue of children, the proceeds of the policy were to be paid over by the said trustees to whomsoever the husband might bequeath the same, and in default to his "next of kin according to English Statute of Distribution"; third, the said H. M. Hewitt bound and obliged himself, within three years from the solemnization of the marriage, to pay to the said trustees 2000*l.* with interest at 5*l.* per cent., to be held upon trust for himself for life, then for his wife if she survived him for life, and at the death of the survivor for the children of the marriage and their issue, as therein provided. And in contemplation of the then intended marriage R. J. Ford thereby assigned and made over to the said trustees all the property, estate, and effects, heritable and movable, real and personal, then belonging to her, or which she might acquire by successor or otherwise, or which might vest in her during the subsistence of the marriage; and the trustees of her father's settlement assigned and conveyed to the said trustees of the marriage contract one half of certain capital funds (such half amounting to 5445*l.*) contained in her father's settlement, subject to the life rent of her father therein; and H. M. Hewitt thereby renounced his *jus mariti* and rights of administration in relation to all the wife's property and funds, and the said trustees were to hold the wife's funds for the benefit of R. J. Ford and her children as therein declared. The contract of marriage further provided that the said trustees should be entitled to the fullest power and privileges "belonging by law to gratuitous trustees," and particularly with power to the said trustees to hold the investments and securities in or upon which the capital or funds then stood, or to realize and reinvest any part thereof "in good heritable security, or in the purchase of feudities, or ground annuals," or in the other investments therein specified. The wife's father was dead and also three of the original four trustees. By a deed of May 15, 1907, supplemental to the principal contract of marriage of June 4, 1890, and purporting to be made "in exercise of the power for this purpose by the principal contract given to the said George

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Southby Hewitt, and of every or any other power enabling him in this behalf," G. S. Hewitt, as sole surviving trustee, appointed three new trustees of the principal marriage contract. The plaintiffs were the present trustees of the marriage contract and were all English.

At the date of the execution of the marriage contract H. M. Hewitt was a domiciled Englishman, and his wife was domiciled and resident in Scotland. H. M. Hewitt died on January 11, 1914, leaving his wife and two children, both minors, and all now resident in England. The securities in which the husband and wife's funds were invested were English, and included freehold ground rents in England which the trustees desired to retain. The plaintiffs were all desirous of retiring from the trusts of the settlement and of appointing the Public Trustee to be sole trustee. The Public Trustee was willing to accept the trust if the Court held that he had power to do so.

On October 21, 1914, the trustees took out a summons, to which the widow and the Public Trustee and an infant child of the marriage were made respondents, asking, *inter alia*, whether the plaintiffs, as such trustees, had power under the provisions of the Public Trustee Act, 1906, or otherwise, to appoint the Public Trustee to be sole trustee, or a trustee of the property subject to the trusts of the deed in the place of or in addition to the plaintiffs.

W. H. Draper, for the trustees of the marriage deed. All the parties concerned are desirous that the Public Trustee should be appointed sole trustee. It is submitted that the Court will sanction this appointment where the trustees and beneficiaries are all English, and the trusts are such as the English Court could carry out. The lady and her father being Scotch, the settlement was drawn by her solicitor in Scotch form, but now the matrimonial domicile being English, that law governs the contract, and the Public Trustee may be appointed sole trustee.

C. D. Myles, for the widow and an infant defendant. The widow is also desirous of the appointment of the Public Trustee. There is nothing to prevent the Public Trustee in England from dealing with property in Ireland or Scotland or elsewhere if appointed trustee of an English settlement: Fulton on the Public Trustee,

pp. 76—78. It is submitted that this settlement was intended to be governed by English law, it was executed by some of the parties in England, and the wife, although Scotch at the moment of execution, acquired an English domicile directly she was married.

T. R. C. Dill, for the Public Trustee. The Public Trustee desires to have the matter fully argued before the Court so that a rule may be laid down for his future guidance in similar cases. There are certain objections to the appointment which should be brought to the notice of the Court. The Public Trustee is a statutory corporation and can only act under statutory powers: *Baroness Wenlock v. River Dee Co.* (1) If he accepts a trust which the statute does not permit him to accept he is acting ultra vires, and serious consequences will ensue; he will not be able to avail himself of the privileges of the Act to charge the statutory fees (s. 9), nor would the beneficiaries have their statutory remedy against the Consolidated Fund (s. 7). The Public Trustee Act, 1906, applies only to English trusts, that is, trusts to which English law applies, and which are under the control of English Courts. The title of the Act itself shows that it is an Act “to amend the law relating to the administration of trusts,” that is the English law of trusts.

In the series of Acts dealing with English trusts from the Conveyancing and Law of Property Act, 1881 (s. 1), down to the Trustee Act, 1893 (ss. 41 and 52), there have been sections expressly providing that the Act shall not extend to Scotland (Trustee Act, 1888, s. 1, and Trust Investment Act, 1889, s. 2). Then, by s. 17, sub-s. 2, of the Public Trustee Act, 1906, it is also expressly provided that the Act shall not extend to Ireland or Scotland. That only expresses what is clear from the whole Act. Under s. 2, sub-s. 1 (e), the Public Trustee may be appointed to be the administrator of the property of a convict under the Forfeiture Act, 1870. Then in the definition section (s. 15) the Court means the High Court. In s. 4, sub-s. 2, there is a provision that the trust property shall be transferred to the custodian trustee, and for that purpose vesting orders may be made under the Trustee Act, 1893 (s. 41). It would be improper, therefore, for the Public

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(1) (1885) 10 App. Cas. 354.

EVE J. Trustee to accept the trusts of a Scotch or foreign settlement.
 1914 With regard to the marriage contract itself, the question whether
 HEWITT'S it is to be considered English or Scotch must be determined at
 SETTLE- the date when the settlement was executed, and the intention of
 MENT, the parties must be considered: Dicey's Conflict of Laws, 2nd ed.
In re. pp. 635—637, r. 174, sub-rr. 1, 2; *In re Fitzgerald* (1); *In re*
 HEWITT Mackenzie. (2) The law of the matrimonial domicile governs the
v. question unless it is rebutted by other facts and the conduct and
 HEWITT. intention of the parties show that it was to be construed by some
 other law. Here the contract of marriage is clearly in Scotch
 form and contains provisions and expressions unknown to
 English law. The rights of the beneficiaries under the settle-
 ment must therefore be determined according to Scotch law.

Assuming, therefore, the contract to be in Scotch form, the
 Trustee Act, 1893, does not apply, and the only power to appoint
 new trustees is that contained in the contract itself under the words
 "such other persons as may be assumed by the trustees into the
 trust." It may be doubtful whether there was a proper appoint-
 ment of new trustees by the deed of May 15, 1907, and if so, it
 is a question whether the present trustees can properly appoint
 the Public Trustee, even if it was competent for him to accept
 the trusteeship. Sect. 5 of the Public Trustee Act creates no
 new power to appoint, but the persons having the power may
 appoint the Public Trustee as if he were a private trustee.

W. H. Draper in reply.

EVE J. The question I have to decide is whether the Public
 Trustee is competent to be a trustee of this settlement, and if I
 come to the conclusion that this is a Scotch settlement the larger
 question then arises whether he is competent to be a trustee of
 any settlement other than an English one. First, then, is this
 an English or a Scotch settlement, that is to say, is it to be
 construed according to English or Scotch law? In the absence
 of any indication of a contrary intention, a marriage settlement
 is to be construed according to the law of the matrimonial
 domicile, but, as has been pointed out in the cases to which Mr.
 Dill referred, the rule yields to the intention of the parties, and

(1) [1904] 1 Ch. 573.

(2) [1911] 1 Ch. 578.

if from the settlement or the circumstances in which it was executed an intention that it shall be construed by some other law can be gathered, then it must be construed by that other law and not by the law of the matrimonial domicile. Here the matrimonial domicile was English, but there are I think many indications that the parties intended the marriage contract to be construed and governed by Scotch law. The husband, a domiciled Englishman resident and intending to continue resident in England, settled some furniture and a policy of assurance and covenanted within three years of the marriage to pay to the trustees a sum of 2000*l*. The wife, a daughter of Scotch parents resident in Scotland, did not bring into settlement any property or estate in possession. Under the marriage settlement of her parents, of whom her father was then the survivor, she was entitled to one moiety of the funds thereby settled expectant on the death of her father, and this interest she settled. The deed is in Scotch form throughout and is one to which the father and the trustees of the parents' marriage settlement are made parties. All the original trustees were of Scotch domicile. At the very outset is a statement that the father retains his Scotch domicile, and throughout the deed are to be found numerous terms and provisions the true construction of which is unknown to English law, and can only be ascertained by reference to Scotch law. Moreover, as Mr. Dill has pointed out, while it is expressly provided that the husband's property is in certain events to be distributed in accordance with the English Statute of Distributions, there is no similar provision in the case of the wife's property, and this, in the like events, would fall to be dealt with in accordance with Scotch law and not in accordance with the English statute. This seems to show that none of the parties contemplated that the deed would be construed throughout as an English settlement, but rather that when it was intended to make the law of England applicable special provision therefor was necessary. I think that both in form and substance this was intended to be a Scotch settlement to be governed and construed by the law of Scotland; and if so, it still remains a Scotch settlement notwithstanding the facts that the beneficiaries and the persons who now claim to be the trustees are all resident in England,

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and that the whole of the trust fund is invested in securities in England. These circumstances, although they cannot alter or affect the intention of the parties when the deed was executed in 1890 (see per Vaughan Williams L.J. in *In re Fitzgerald* (1)), constitute a sufficient reason for appointing the Public Trustee to be sole trustee of the settlement, if he is eligible and subject to the question of his competency he has intimated his willingness to accept the trust. In order to ascertain whether he can do so it is necessary to consider the provisions of the Act by which the office was established and its powers defined, and in my opinion that Act contains nothing which warrants the appointment of the Public Trustee to be a trustee of what I will call a foreign settlement—that is to say, a settlement construed and governed by the law of any foreign country, or of any part of the United Kingdom to which the Act itself does not extend.

As pointed out by Mr. Dill in his exhaustive and helpful analysis of the Act and of the other Acts with which it must be read, not only is there a complete absence from the Act of any enabling words, or even provisions, from which one could gather an intention on the part of the Legislature to extend the powers of the office to the acceptance of foreign trusts, but there are many indications pointing to the contrary conclusion. It is enough for me, I think, to say that in the absence of statutory power, either express or necessarily to be implied from what is expressed, I cannot hold that the Public Trustee can accept the trusteeship of a foreign settlement, and I decide that no such statutory power at present exists. This conclusion does not of course preclude him from executing the trusts of an English settlement involving the management or realization of, or the intermeddling with, property outside the jurisdiction. That is quite a different thing.

The applicants must pay the costs of the Public Trustee, and there will be no other order as to costs.

Solicitors: *Morse Hewitt, Walter & Thornton; Routh, Stacey & Castle; L. J. Fulton.*

(1) [1904] 1 Ch. 573, 578.

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[1914 A. 644.]

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Dec. 10, 21.

Highway—Nuisance—Quarry in Land adjoining Road—Collapse of Fence and Road—Duty of Present Occupier to restore—Remedy of Local Authority—Quarry (Fencing) Act, 1887 (50 & 51 Vict. c. 19), s. 3.

Defendant owned and occupied land, being a worked-out quarry, immediately adjoining a public highway vested in an urban district council and repairable by the inhabitants at large. A prior owner of the land had, in 1865, made the excavation in order to quarry for limestone, and until then the surfaces of the road and the land had been on the same level. The excavation being a source of danger and obstruction to persons using the road, the excavator, to protect them and the road, built alongside the road a wall, the bottom of which rested on a ledge of limestone left ungotten for the purpose and served as a retaining wall for the subsoil of the road and as a fence wall above its surface. In February, 1913, part of the wall collapsed and fell into the quarry, and in consequence a considerable part of the subsoil of the road and of its surface fell in also, the road thus becoming impassable, a source of danger to persons attempting to use it, and a nuisance, liable under s. 3 of the Quarry (Fencing) Act, 1887, to be dealt with summarily under the Public Health Act, 1875:—

Held, (1.) that there was also a common law obligation on the possessor of the excavation to keep it fenced off whether it was made before or after his possession began, and whether he was or was not liable to his landlord, if any; and (2.) that, in an action by the Attorney-General at the relation of the council, a mandatory order must be made on defendant to abate the nuisance by restoring the road to its condition prior to the subsidence and by rebuilding the wall or providing some other reasonable fence between the road and the quarry.

Greenwell v. Low Beechburn Coal Co. [1897] 2 Q. B. 165 distinguished.

THE plaintiffs in this action were the Attorney-General on the relation of the Knottingley Urban District Council and also the district council themselves, while the defendant was the owner and occupier of a plot of land, being a worked-out quarry, immediately adjoining a portion of a footpath vested in the council and repairable by the inhabitants at large. The material facts were stated, as follows, in paragraphs 4 to 9, inclusive, of the statement of claim: “(4.) Until the working referred to in the next paragraph the surface of the said footpath and the surface of the said plot of land now owned by the defendant were

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SARGANT J. on the same level. (5.) About the year 1865 the then owner of the said plot of land, or the occupier thereof with the consent of the owner, excavated the same to a great depth alongside the said footpath for the purpose of quarrying limestone for profit. Until after discovery the plaintiff cannot give the date when such excavation reached the edge of the said footpath nor the name of the person making the same, but such date was in any case long subsequent to the date when the said footpath first became a public highway. (6.) The result of the working referred to in the preceding paragraph was to leave an excavation 45 feet deep, with perpendicular sides, immediately adjoining the south-east edge of the said footpath, and extending along the same for a distance of sixty-five yards. Such excavation was a source of danger and obstruction to persons using the said footpath, and a public nuisance by reason of (a) the danger of passengers falling over the edge thereof, and (b) the danger of the footpath and the underlying soil slipping into the same. (7.) For the protection of the said footpath and of persons lawfully using the same, the then owner or/and occupier of the said quarry erected a wall alongside the said footpath. The bottom of such wall was based upon a ledge of limestone left ungotten for the purpose, and it served as a retaining wall to the subsoil of the footpath, and also, above the surface of the path, as a fence wall. (8.) It was the duty of the owners and occupiers for the time being of the said quarry to erect, and thereafter maintain in good condition, the said wall or some other equally efficient protection, and, until the default of the defendant hereinafter referred to, they have so maintained and repaired the said wall. (9.) In or about the month of February, 1913, a portion of the said wall 51 feet long collapsed and fell into the quarry, and in consequence of such collapse, and at the same time or shortly afterwards, a considerable quantity of the subsoil of the said footpath and a portion of the surface thereof slipped into the quarry. There is now a gap in the said footpath 50 feet long and 6 feet wide, the bottom of which slopes at a steep angle into the quarry. The footpath is impassable and a source of danger to persons trying to use the same, and its condition amounts to a public nuisance."

The plaintiffs claimed a declaration as to the defendant's duty to maintain and repair, a declaration as to the existing condition of the footpath, and a mandatory injunction compelling the defendant to abate the nuisance by rebuilding the wall and restoring the footpath. The defendant having failed to deliver a defence, the plaintiffs gave notice of motion for judgment, and set the case down as a short cause, but his Lordship directed it to be set down in the list of causes for trial with witnesses, and to be argued on the authorities.

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Romer, K.C., and *Joshua Scholefield*, for the plaintiffs. By s. 3 of the Quarry (Fencing) Act, 1887 (50 & 51 Vict. c. 19), "where any quarry dangerous to the public is in open or unenclosed land, within fifty yards of a highway or place of public resort dedicated to the public, and is not separated therefrom by a secure and sufficient fence, it shall be kept reasonably fenced for the prevention of accidents, and unless so kept shall be deemed to be a nuisance liable to be dealt with summarily in manner provided by the Public Health Act, 1875." This makes the omission to repair a nuisance liable to be dealt with under ss. 91 et seq. of the Public Health Act, 1875. Sect. 107 of that Act provides that "any local authority may, if in their opinion summary proceedings would afford an inadequate remedy, cause any proceedings to be taken against any person in any superior Court of Law or Equity to enforce the abatement or prohibition of any nuisance under this Act." The urban district council is the proper body to be joined with the Attorney-General in taking proceedings in a superior Court. The defendant is also under a common law obligation, for the occupier of land adjoining a highway is not entitled, in using his land, to make any excavation thereon so as to render the way unsafe to persons using it with ordinary care, and he is guilty of a public nuisance in making such a dangerous excavation: *Pratt on Highways*, 16th ed. p. 120; *Barnes v. Ward* (1); and it is no defence to the occupier that the excavation already existed when he took possession: *Coupland v. Hardingham*. (2)

(1) (1850) 9 C. B. 392; 19 L. J. (2) (1813) 3 Camp. 398.
(C.P.) 195.

SARGANT J. The local authority, in carrying out their statutory obligation to maintain the highway, may make a road as commodious to the public as the original road, and are entitled, at the cost of the occupier of the land containing the excavation, to have the highway restored to its original level if it will not otherwise be as commodious as the original way: *Wednesbury Corporation v. Lodge Holes Colliery Co.* (1), as varied by *Lodge Holes Colliery Co. v. Wednesbury Corporation.* (2)

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The occupier of land adjoining a highway is not only bound to fence, but to support and retain the soil of the highway. In *Greenwell v. Low Beechburn Coal Co.* (3) Bruce J. says: "It seems to me that the true rule is laid down by Rolfe B. in *Reedie v. London and North Western Ry. Co.* (4) He says: 'It is not necessary to decide whether, in any case, the owner of real property, such as land or houses, may be responsible for nuisances occasioned by the mode in which his property is used by others not standing in the relation of servants to him, or part of his family. It may be that, in some cases, he is so responsible. But then his liability must be founded on the principle that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or not.'" A man may be indicted for a nuisance by not repairing an erection which has become dangerous to passers-by although he is only a tenant at will and not liable *ratione tenurae* to repair: *Reg. v. Watson.* (5) And it is not necessary for the plaintiff to show any personal negligence, or knowledge of defects, on the part of the occupier of the land: *Tarry v. Ashton.* (6) There being here a common law nuisance, it is the duty of the present owner of the quarry to prevent the nuisance continuing, and an injunction may be granted to enforce the performance of that duty. When a defective fence on land abutting on a highway is a nuisance the owner of the fence is liable for injuries caused by the fence being defective: *Harrold v. Watney.* (7)

Cur. adv. vult.

(1) [1907] 1 K. B. 78.

(4) (1849) 2 Ex. 244, 256.

(2) [1908] A. C. 323.

(5) (1703) 2 Ld. Raym. 856.

(3) [1897] 2 Q. B. 165, 177.

(6) (1876) 1 Q. B. D. 314.

(7) [1898] 2 Q. B. 320.

1914. Dec. 21. SARGANT J. This action comes on by way of SARGANT J.
 motion for judgment in default of delivery of defence. It was 1914
 originally set down as a short cause, but I did not feel myself ATTORNEY-
 at liberty to deal with it on that basis or without some examina- GENERAL
 tion of the authorities. Accordingly, it has since been fully v.
 argued on behalf of the plaintiffs, and, although I have not had ROE.
 the assistance of any argument on behalf of the defendant, I am
 now in a better position to give judgment. [His Lordship stated
 the facts and read paragraphs 4 to 9 of the statement of claim,
 and continued:]

All the statements I have read are purely statements of fact except the allegation as to the duty of the owners and occupiers of the quarry to erect and maintain a wall and the allegation (which is an obvious inference from the facts) as to the present state of the footpath being a nuisance.

The plaintiffs claim a declaration as to the duty to maintain and repair, a declaration as to the existing condition of the footpath, and a mandatory injunction compelling the defendant to abate the nuisance by rebuilding the wall and restoring the footpath.

By the Quarry (Fencing) Act, 1887, a special obligation is imposed on owners of quarries to fence quarries within fifty yards of a highway, and a quarry not so fenced is liable to be dealt with as a nuisance under the Public Health Act, 1875. But, further than this, it seems clear that there is a common law obligation on the possessor of a dangerous excavation by the side of the highway to keep it fenced off whether the excavation was or was not there before his possession began: *Coupland v. Hardingham* (1), a case in which, as pointed out in *Barnes v. Ward* (2), it is clear that the excavation was not in any part of the highway but by the side of it. And this being so, the right of the plaintiffs to enforce the obligation is clear: *Wednesbury Corporation v. Lodge Holes Colliery Co.* (3)

Again, as regards nuisance on or by the highway, the obligation of the actual occupier is clear whether he is or is not liable to his landlord, if any: *Reg. v. Watson* (4); *Tarry v.*

(1) 3 Camp. 398.

(2) 19 L. J. (C.P.) 195.

(3) [1907] 1 K. B. 78.

(4) 2 Ld. Raym. 856.

SARGANT J. *Ashton*. (1) And in *Attorney-General v. Tod-Heatley* (2) this obligation was enforced by injunction. Cases such as *Greenwell v. Low Beechburn Coal Co.* (3), which deal with the obligations between private owners when support has been removed by a predecessor in title, appear to stand on a somewhat different footing, and even there the question of liability was left open in cases where there might be a structure to be maintained.

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For my own satisfaction I required an affidavit to be filed for the purpose of showing what would be the probable cost of rebuilding the wall and restoring the footpath. An affidavit was accordingly made by Mr. Ingle, the county surveyor, and in this he estimates that the cost of rebuilding the wall from the quarry bottom to its original height, that is to say, to four feet above the level of the footpath, would be 70*l.* 6*s.*, and the cost of filling in the footpath when the wall has been built would be 11*s.* It appears, therefore, that there would be no real difficulty in abating the present continuing nuisance.

The declarations that are asked for appear to represent the state of the law with substantial accuracy, and to constitute the logical foundation for the relief to which the plaintiffs are entitled. But I see no sufficient reason for embodying these declarations in the actual judgment. I merely grant a mandatory order on the defendant forthwith to abate the nuisance complained of in the pleadings, by restoring the footpath to its former condition prior to the subsidence in or about February, 1913, and by rebuilding the former wall or providing some other reasonable fence to separate such footpath from the defendant's quarry, and by doing all works reasonably necessary for the purpose aforesaid. The defendant must pay the costs of the action, to be taxed.

Solicitors: *Butterworth & Co., for Carter, Bentleys & Gundill, Pontefract.*

(1) 1 Q. B. D. 314.

(2) [1897] 1 Ch. 560.

(3) [1897] 2 Q. B. 165.

In re HOWELL.

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In re BUCKINGHAM.

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LIGGINS *v.* BUCKINGHAM.

Nov. 2, 3.

[1914 H. 726.]

Will—Construction—Residue to be at Discretion of Executor and at his own Disposal—Absence of Trust—Sole Executor—Prior Legacy in Will to Executor—Executor, whether entitled beneficially.

Testatrix by her will appointed G. B. her executor, and directed him to pay her debts and funeral and testamentary expenses. She then bequeathed various pecuniary legacies, including a legacy to G. B. “(my executor),” and concluded her will in the following terms:—
 “After the aforesaid legacies have been duly paid the remainder or residue of my property (if any) shall be at the discretion of my executor and at his own disposal” :—

Held (reversing the decision of Warrington J. [1914] 2 Ch. 173), that G. B. took the residuary estate of the testatrix as a beneficiary and not as trustee for the next of kin of the testatrix.

APPEAL from a decision of Warrington J. (1)

Jane Howell by her will, dated September 27, 1901, and made on a printed form, provided as follows: “I appoint George Buckingham, weaver, of Station Street, West Foleshill, Coventry, and of to be the executor of this my will. I direct my executor to pay my just debts and funeral and testamentary expenses. I give and bequeath unto my brother Joseph Riley of Sheffield all his expenses which he shall incur by attending my funeral.”

The testatrix then bequeathed various pecuniary legacies including the following: “Unto Hannah Buckingham wife of my executor the aforesaid George Buckingham the sum of twenty pounds Unto George Buckingham (my executor) the sum of ten pounds.” She concluded her will in the following terms: “After the aforesaid legacies have been duly paid the remainder or residue of my property (if any) shall be at the discretion of my executor and at his own disposal.”

The testatrix died on May 2, 1903.

(1) [1914] 2 Ch. 173.

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George Buckingham proved her will and died on September 18, 1910, having by his will, dated August 27, 1910, appointed F. Liggins and E. Hilton executors thereof, who thereby became derivative executors of the will of the testatrix, and having given his residuary estate to William Buckingham and Hannah Selina Flude.

The residuary property of the testatrix consisted (*inter alia*) of a reversionary interest, which had recently fallen into possession.

Upon an originating summons taken out by the executors for the determination of the questions (*inter alia*) whether upon the true construction of the will of the testatrix the gift of "the remainder or residue of my property (if any) shall be at the discretion of my executor and at his own disposal" constituted a beneficial gift in favour of George Buckingham, with a power of disposition by will or otherwise, and, if the last-mentioned question should be answered in the negative, who, upon the death of the testatrix, became entitled to her residuary estate.

Warrington J. held that George Buckingham took the residuary estate of the testatrix in his capacity of executor and not as a beneficiary, and held it as trustee for the next of kin of the testatrix.

The representatives of George Buckingham appealed.

H. M. Broughton, for the appellants. The bequest of residue to George Buckingham was a gift to him beneficially. The question whether a gift of residue to executors without words of benefit superadded is a gift to them for their own benefit, or whether they take as trustees for the next of kin, is a question of the construction of the will: *Hoy v. Master* (1); *Williams v. Arkle* (2); *Maybery v. Lightfoot* (3); Theobald on Wills, 7th ed. p. 486. An executor cannot take a gift under a will unless he accepts the office, but George Buckingham did prove this will. The testatrix in this case has given the residue to George Buckingham as an individual, not as executor; he was the sole executor, no trust of any kind was declared in the will,

(1) (1834) 6 Sim. 568.

(2) (1875) L. R. 7 H. L. 606.

(3) [1914] A. C. 782.

and the words "at his own disposal" import ownership and are equivalent to "for his own benefit." The fact that no trusts are declared distinguishes this case from *Yeap Cheah Neo v. Ong Cheng Neo* (1), and in that case there were four executors. Warrington J. relied on *Fenton v. Nevin* (2), but in that case there were two executors, trusts were declared by the will, and there were no words equivalent to "at his own disposal."

J. W. Manning, for the next of kin. The learned judge could not have come to any other conclusion consistently with the authorities. There is no reported case in which an executor, described as an executor and not as an individual, has been allowed to take a legacy beneficially. Here the residue is to be applied "at the discretion of my executor" and that implies a trust. *Yeap Cheah Neo v. Ong Cheng Neo* (1) exactly covers this case. In order to enable an executor to take such a gift beneficially the intention of the testator that he should do so must be absolutely clear and free from all doubt. The onus is on the executor to show that there can be no doubt.

[LORD COZENS-HARDY M.R. That is going too far. In every case of this sort there is a doubt.]

It would have been easy for the testatrix to give George Buckingham the residue beneficially in similar language to that which she had used in giving legacies, but she has not done so: *In re Dean* (3); *In re Sinclair*. (4)

[LORD COZENS-HARDY M.R. I do not think the *Weekly Notes* ought to be cited as authority on will cases.]

The words "at the discretion" show that he takes as executor, and "at his own disposal" only refers to the fact that he is a sole trustee: *Buckle v. Bristow*. (5)

No reply was called for.

LORD COZENS-HARDY M.R. This case has been very well argued on both sides and with reasonable brevity, and after listening carefully to all that has been said I have come to the conclusion that the decision of Warrington J. cannot be

(1) (1875) L. R. 6 P. C. 381.

(3) (1889) 41 Ch. D. 552, 561.

(2) (1893) 31 L. R. Ir. 478.

(4) [1903] W. N. 113.

(5) (1864) 10 Jur. (N.S.) 1095.

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supported. It is said that where a legacy is given to an executor described as such, he takes it as a trustee and cannot claim any beneficial interest in it. I protest against that proposition as being far too wide. The construction of the gift must depend on the language of the will, and I do not accept the proposition that an executor cannot take a legacy for his own benefit unless it is shown irresistibly that the right conclusion must be, without any doubt whatever, that he is intended to take it for his own purposes.

Jane Howell made her will in September, 1901. She made use of a printed form which she filled up herself. So far as material the will is this. She appointed George Buckingham "to be the executor of this my will." Then she gave several legacies in the form of absolute gifts, and then "unto Hannah Buckingham wife of my executor the aforesaid George Buckingham the sum of 20*l.* Unto George Buckingham (my executor) the sum of 10*l.*"; and she concluded her will as follows: "After the aforesaid legacies have been duly paid the remainder or residue of my property (if any) shall be at the discretion of my executor and at his own disposal." Under these words it is contended, and Warrington J. has so decided, that George Buckingham did not take the residue at his own disposal but as a trustee, and the next of kin take the beneficial interest. I am unable to come to that conclusion, and there is no authority which makes it my duty to decide in that way contrary to my own view. Several cases have been cited in which there have been two or three executors, and the property was left at the discretion of the executors; and it was held that those words negative the idea of a beneficial interest. But I know of no case which in any way applies to a will like this, in which there was no trust declared either expressly or by implication prior to the gift of residue to the executor, and there was a sole executor, and it was held that the executor did not take beneficially.

This is really a gift to the individual whom the testatrix has several times indicated as her executor. She does not use the words "my said executor" there or anywhere else in her will. In my opinion these words are not a direction to the executor as such

to dispose of the property at his discretion, but form a gift to George Buckingham; and not the less so because the property is to be at his own disposal. In my opinion there is nothing in the Irish case *Fenton v. Nevin* (1), on which Warrington J. based his judgment, which conflicts with this view. In that case there were two executors and no words similar to "at his own disposal." The appeal must be allowed.

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KENNEDY L.J. I am of the same opinion for the same reasons and will only add that I am much indebted to counsel for the way in which the case has been argued.

SWINFEN EADY L.J. I am of the same opinion, although the case appears to me to be not free from difficulty. It will be observed that no trust is declared in any of the earlier parts of the will. In *Fenton v. Nevin* (2) FitzGibbon L.J. said: "It is plain that whatever an executor takes as such he takes as a representative, and therefore not beneficially. Accordingly, before an executor can take any part of the assets beneficially, he must show that the testator has given it to him as an individual." The question is whether that has not been shown in this case. The testatrix here has superadded words to show that the gift is not only to be in his discretion as executor but as an individual, and not under any trust. It is to be at his own disposal. Those words "at his own disposal" afford the key to the construction of the gift. In my opinion they show that he is to take beneficially.

For these reasons I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Arthur C. Dowding, for W. L. J. Orton, Coventry; Collyer-Bristow, Curtis, Booth, Birks & Langley, for F. Hall, Folkestone.*

(1) 31 L. R. Ir. 478.

(2) 31 L. R. Ir. 484.

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Nov. 5, 6.

In re JONES.LAST *v.* DOBSON.

[1914 J. 845.]

Will—Devise before Wills Act—Legal Estate to Trustee in Fee Simple—Trust for A. in Fee Simple with Gift over in Case of his Death “unmarried” and without Issue—Gift over without Words of Limitation—Extent of Defeasance.

T., who died in 1828, by his will devised real estate to a trustee and his heirs in trust for his sister (who died in 1841) during her life, and after her death in trust for his nephew James, his heirs and assigns, but if James should die “unmarried and without lawful issue” then in trust for testator’s niece Sarah during her life, and after her death in trust for her children living at her death, share and share alike, who should attain the age of twenty-one years being boys, or being girls should attain that age or be married, with benefit of survivorship between them.

In 1858 James married a wife who died in his lifetime. He never had any issue. He died in 1893, having made a will disposing of his real estate. Sarah died in 1864 leaving children who attained the age of twenty-one, the last survivor of whom died in 1900.

The question was whether the property devolved under the gift over contained in T.’s will or under the will of James. Down to 1914 the devolutions of the property were such that the same persons were entitled to possession on either hypothesis:—

Held, that James took an equitable estate in fee simple defeasible in the event of his death without leaving a widow or issue, the collocation of the words “without lawful issue” showing that the word “unmarried” was used not in its primary sense of “without ever having been married,” but in its secondary sense of “without leaving a widow.”

In re Sanders’ Trusts (1866) L. R. 1 Eq. 675 and *In re Chant* [1900] 2 Ch. 345 followed.

Heywood v. Heywood (1860) 29 Beav. 9 and *Roberts v. Bishop of Kilmore* [1902] 1 I. R. 333 distinguished.

Held, also, that the gift over in T.’s will only divested the equitable estate in fee simple previously given to James so far as was necessary to give effect to the subsequent interests given to Sarah and her children.

Gatenby v. Morgan (1876) 1 Q. B. D. 685 followed.

Held, also, that under the old law before the Wills Act, 1837, the subsequent interests given by T.’s will to the children of Sarah created equitable estates for life only, the rule that the estate of a cestui que

trust is commensurate with the estate of his trustee being inapplicable to the case for the reason that the equitable estate in fee simple given to James required in any case a corresponding legal estate in the trustee, and that the title to the property in the events which had happened must now be traced under the will of James.

Challenger v. Sheppard (1800) 8 T. R. 597 and *Moore v. Cleghorn* (1847) 10 Beav. 423; on appeal (1848) 12 Jur. 591, distinguished.

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Thomas Jones, who died on May 10, 1828, by his will, dated January 24, 1827, specifically devised to his brother James Jones and his heirs all that his freehold estate situate at Eton, in the county of Buckingham, upon trust to receive and take the rents and profits and pay them over to his sister, Sarah Binfield, or to permit her to receive and take the same during her life, for her separate use, and after her death in trust to and for his nephew James Lee Binfield, his heirs and assigns, for ever, to and for his and their own use and benefit, but in case of the death of the said James Lee Binfield "unmarried and without lawful issue," then upon trust for his niece Sarah Bird during her life, for her separate use, and after her death "upon trust for all and every the children of the said Sarah Bird living at the time of her decease, share and share alike, who shall attain the age of twenty-one year being boys or being girls shall attain that age or be married, with benefit of survivorship amongst the said children, save and except" two named children who were excepted because otherwise provided for under the will of their grandfather.

Sarah Binfield died in 1841.

Sarah Bird died in 1864 leaving six children who survived her, four of whom were capable of taking under the gift over in Thomas Jones's will if the gift over was effective. The last survivor of these four children was Caroline Isabella Dobson, who alone survived James Lee Binfield, the other three children having died in his lifetime.

In 1858 James Lee Binfield married a wife who died in his lifetime. He never had any issue and died in 1893, having by his will, dated April 5, 1887, devised his residuary real estate (which included his estate and interest, if any, in the property in question) to Caroline Isabella Dobson during her life, with remainder to her husband, Joseph Treherne Dobson, during his life, with

SARGANT J. remainder to the children of Caroline Isabella Dobson in equal
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Caroline Isabella Dobson was married to Joseph Treherne Dobson before 1883. She died in 1900, having made a will, dated October 19, 1895, appointing two executors and trustees to whom she purported to devise the property in trust for her husband (who survived her) during his life, and after his death in trust for her children as joint tenants in fee simple. She had six children, all of whom were living at the death of James Lee Binfield and five of whom were living at her own death. It was, however, admitted by all parties that, assuming that the fee simple was vested in her under Thomas Jones's will, she had no testamentary power over the property under the Married Women's Property Act, 1882, s. 5, or otherwise, and that her will was therefore in any case inoperative. John Miller Dobson was her only son and heir-at-law. He died in 1912, having by his will, dated December 4, 1911, appointed Charles William Last his sole executor and trustee.

Joseph Treherne Dobson died in 1914.

This was an originating summons taken out by Charles William Last raising the question whether the title to the property was to be traced under the will of James Lee Binfield or under the gift over contained in the will of Thomas Jones.

Romer, K.C., and *W. F. Webster*, for the plaintiff. The limitation in favour of James Lee Binfield is an equitable estate in fee simple defeasible on the event named, and the gift over took effect on his death without leaving a widow or issue surviving. The word "unmarried" is capable of more than one meaning, and the collocation of the words "without lawful issue" shows that it is used not in its primary sense of "without ever having been married," but in its secondary sense of "without leaving a widow," since otherwise the words "without lawful issue" are superfluous: *In re Chant*. (1) Notwithstanding the absence of express words of limitation in the gift to the children of Sarah Bird they took equitable estates in fee simple under the old law prior to the Wills Act. A legal estate in fee simple was given to

(1) [1900] 2 Ch. 345.

James Jones, the trustee, and it is a well-established rule in SARGANT J. such cases that the estate of a cestui que trust is commensurate with the estate of his trustee: *Mocre v. Cleghorn* (1); *Challenger v. Sheppard* (2); Jarman on Wills, 6th ed. vol. ii. p. 1804; Hawkins on Wills, 2nd ed. p. 173; Theobald on Wills, 7th ed. p. 408. The survivorship between the children is to be referred to the period of distribution: Theobald on Wills, 7th ed. p. 681. The result is that in the events which have happened the title to the property must be traced under the gift over in Thomas Jones's will through Mrs. Dobson's heir-at-law, since Mrs. Dobson had no testamentary power over this property under s. 5 of the Married Women's Property Act, 1882,—*Reid v. Reid* (3)—or otherwise.

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H. S. Preston, for the living children of Mrs. Dobson. The title must be traced under the will of James Lee Binfield, whose estate became indefeasible on his marriage. The primary meaning of the word "unmarried" is "without ever having been married," and the onus is on those who dispute the primary meaning. The mere fact that the words "without lawful issue" are on this construction surplusage is not sufficient reason for departing from the primary meaning: *In re Sergeant* (4); *Dalrymple v. Hall* (5); *Heywood v. Heywood* (6); *Roberts v. Bishop of Kilmore*. (7) The reasoning in *In re Sanders' Trusts* (8) does not apply here. *In re Chant* (9) so far as it is based on the mere ground of tautology was wrongly decided.

W. A. Jolly, for the legal personal representative of a deceased daughter of Mrs. Dobson, supported the same argument. First, I support the argument that the estate of James Lee Binfield became indefeasible on his marriage. The Court will favour the construction that gets rid of the defeasibility at as early a date as possible.

[SARGANT J. Is there any authority for that proposition in the case of a clear divesting clause? Is it not then a mere matter of the construction of the terms of the clause?]

I am not aware of any direct authority. [He further cited

(1) 10 Beav. 423; on appeal 12 Jur. 591.

(2) 8 T. R. 597.

(3) (1886) 31 Ch. D. 402.

(4) (1884) 26 Ch. D. 575.

(5) (1881) 16 Ch. D. 715.

(6) 29 Beav. 9.

(7) [1902] 1 I. R. 333.

(8) L. R. 1 Eq. 675.

(9) [1900] 2 Ch. 345.

SARGANT J. Theobald on Wills, 7th ed. pp. 661, 706; *In re Ball* (1); *Doe*

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Secondly, in any case the question becomes immaterial, since the gift over in Thomas Jones's will only divests the equitable fee simple previously given to James Lee Binfield so far as is necessary to give effect to the subsequent interests given to Sarah Bird and her children. *Gatenby v. Morgan* (3) is a direct authority on this point, the only difference being that in that case the limitations were legal and not equitable. The question then is, What estates did the children of Sarah Bird take? Prima facie under the law as it existed before the Wills Act, 1837, in the absence of express words of limitation their interests were life interests only. The rule that the estate of a cestui que trust is commensurate with that of his trustee is inapplicable to the present case. The reason of the rule is the inconsistency of giving a larger estate to the trustee if the cestui que trust is to take for life only, but there is no such inconsistency under the present will, since in any case the equitable fee simple given to James Lee Binfield required a corresponding legal estate in the trustee. The reasoning on which the rule is founded is stated in *In re Pollard's Estate* (4) and *Knight v. Selby*. (5) Moreover the words "with benefit of survivorship" are referable to the death of each child of Sarah Bird and point rather to life estates than estates in fee simple. The result is that on the death of Mrs. Dobson, the last survivor of the children of Sarah Bird, the fee simple reverted to the estate of James Lee Binfield and devolved under his will.

Martelli, K.C., and *Austen-Cartmell*, for the legal personal representative of another deceased daughter of Mrs. Dobson, supported the same arguments and referred further to 2 Powell on Devises, 3rd ed. p. 573, and *Glover v. Monckton*. (6) The words "without lawful issue" may be read as "without having had issue," though this does not get over the tautology. In *In re Chant* (7) the words were "unmarried and without leaving a

(1) (1887) 36 Ch. D. 508.

(2) (1819) 2 B. & Al. 441.

(3) 1 Q. B. D. 685.

(4) (1863) 3 D. J. & S. 541.

(5) (1841) 3 Man. & G. 92.

(6) (1825) 3 Bing. 13.

(7) [1900] 2 Ch. 345.

child," and it was not a case of defeasance at all, the first SARGANT J. taker taking a life interest only. Notwithstanding the tautology the primary meaning of the word "unmarried" should not be departed from in order to cut down a fee simple estate.

Romer, K.C., in reply.

[SARGANT J. I am in your favour as to the meaning of the word "unmarried."]

The rule in *Moore v. Cleghorn* (1) as stated by Lord Cottenham is of general application and is stated quite widely in *Hawkins on Wills*, 2nd ed. p. 173.

[SARGANT J. referred to *Smith v. Smith*. (2)]

In *Gatenby v. Morgan* (3) there was no doubt that the legal devisees under the gift over took life estates only. In the present case that is the very point in dispute. It is clear that the entire legal estate vested in the trustee throughout: *Foxwell v. Van Grutten*. (4)

SARGANT J. In this case I have to construe a will made as long ago as 1827 and made by a testator who died in 1828. I have therefore to take into consideration the law existing before the passing of the Wills Act, 1837. It is a most remarkable thing that until the present year the interests in possession should have belonged to parties who were entitled to the property on either construction of the will. [His Lordship read the will and stated the facts, and continued:] The ways in which the title to the property has devolved on the two constructions are shortly as follows. If the gift over in Thomas Jones's will took effect so that Mrs. Dobson as the survivor of the four children became entitled to the entire fee simple, the property passed on her death to her heir-at-law subject to her husband's tenancy by the courtesy. Her heir-at-law was her son, who has died having appointed the plaintiff his sole executor and trustee, and the plaintiff accordingly represents the view that the gift over was effectual and took effect so as to confer an estate in fee simple. If on the other hand the title to the property remained in James Lee Binfield either by virtue of the gift over not having

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(1) 10 Beav. 423 ; 12 Jur. 591.

(3) 1 Q. B. D. 685.

(2) (1861) 11 C. B. (N.S.) 121.

(4) [1897] A. C. 658.

SARGANT J. taken effect, or, as Mr. Jolly contended, on the ground that it only took effect to the extent of partial interests which have since ceased, in that case the property passed under the will of James Lee Binfield and went to the children of Mrs. Dobson living at his death in equal shares. Mrs. Dobson had five children who survived James Lee Binfield in addition to her heir-at-law, the plaintiff's predecessor in title. Three of them who are now living are before the Court, as are the legal personal representatives of the two others, so that all parties interested are sufficiently represented before me.

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The first question is, Did James Lee Binfield die "unmarried and without lawful issue" according to the true construction of Thomas Jones's will? The facts are that he married but had no issue and his wife predeceased him, and therefore at his death he had no wife or child. There is no question but that the term "unmarried" is an ambiguous expression. Its ordinary and primary meaning is no doubt "without ever having been married," that is a "bachelor," and in the absence of any context to the contrary I should no doubt be bound to hold that that is its meaning here, and that accordingly the gift over did not take effect. But it is said that in the present case the primary and natural meaning of the word is displaced and that the secondary meaning of "without leaving a wife," that is a "widower," ought to be attached to the word on account of the subsequent words "and without lawful issue." In my opinion that contention is well founded. If "unmarried" be read in its ordinary sense of "bachelor" the words "and without lawful issue" are entirely superfluous, as is seen at once if for the words used by the testator the words "die a bachelor and without lawful issue" be substituted, since of course a bachelor cannot have lawful issue. There is direct authority both in the case of *In re Sanders' Trusts* (1) and in that of *In re Chant* (2) for saying that the addition of the words "and without lawful issue" to the words "die unmarried" is enough in itself to displace the ordinary and primary signification of the word "unmarried" and cause it to be interpreted in its secondary sense; and quite apart from authority I think that I should have

(1) L. R. 1 Eq. 675.

(2) [1900] 2 Ch. 345.

come to the same conclusion. In my opinion it is impossible to read the words "without lawful issue" in the way in which Mr. Martelli contended, namely, as meaning "without having had lawful issue." I think that the earliest date to which the words can be referred is the death of the testator. Before the passing of the Wills Act, 1837, the expression referred to an indefinite failure of issue, but there is no authority for holding that the expression can be referred to a date earlier than the testator's death, and I observe that in 2 Powell on Devises, 3rd ed. (which was published in 1827), it is laid down at p. 574 as probable that where there is a gift over on death unmarried and without issue it ought to be held that the words refer to the time of the devisee's death. In my opinion the testator was really looking to the events existing at the death of James Lee Binfield. He gave to him an equitable estate in fee simple, thus enabling him to provide for his family apart from the gift over, and I think that the testator's meaning was, "If on the death of James Lee Binfield he has no children living at his death and has not left a widow so that he has nobody to provide for, then I give the property over to the other persons who are subsequently named." I am glad to find that there are direct authorities in support of that view. No doubt in those authorities the gift over did not take effect as a divesting clause, but after the interposition of a life interest; but in my opinion that is not material, because when once I find a clear divesting clause the events on which it is intended to operate must be ascertained from the terms of the clause itself.

In opposition to the above authorities a number of others were cited to me, such as *In re Sergeant* (1) and *Dalrymple v. Hall* (2), which show that the natural prima facie meaning of the word "unmarried" is "bachelor." That I entirely accept, and I only give the word its secondary meaning in the present case on account of the context. Other cases were cited, such as *Heywood v. Heywood* (3) and *Roberts v. Bishop of Kilmore* (4); but those decisions merely come to this—that, though you may construe "unmarried" in the phrase "unmarried and without issue" in

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(1) 26 Ch. D. 575.

(2) 16 Ch. D. 715.

(3) 29 Beav. 9.

(4) [1902] 1 I. R. 333.

SARGANT J. its secondary meaning in the absence of other context, yet if you find a context which shows that the word "unmarried" is still being used in its primary sense you are brought back to that primary meaning. In such cases there is a conflict between the two contexts, and, if they are of equal force, or if the context in favour of the primary signification is the stronger, you retain that primary signification of the word. Those cases, therefore, have no application to the present case, since in the will now in question there is no context except the words "and without lawful issue."

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So far my decision is in favour of the plaintiff. But now comes a further point which was raised in Mr. Jolly's very ingenious argument, namely, that, though the gift over took effect, it only vested life interests in Sarah Bird and her children, and only displaced the fee previously given to James Lee Binfield to the extent required to give effect to those life interests. The argument divided itself into two branches, namely, first that this would have been the effect of the gift had the interests given been legal interests, and secondly that no difference in this respect is caused by the limitations being equitable limitations only.

As regards the first point reliance was placed on *Gatenby v. Morgan* (1), where the gifts were very similar to those in the present case except that they were gifts of legal and not equitable interests. The head-note to the report of that case is as follows:—"A testator by will of April, 1811, devised certain hereditaments to his granddaughter E. C. and her heirs. But if E. C. died without leaving lawful issue living at her death, the testator devised the hereditaments 'unto and to the use of the nine children of J. A. to be equally divided among them share and share alike.' And he devised all the residue of his estate to his son P. C. E. C. died, leaving no issue living at her death. One of the nine children of J. A. survived E. C. : Held—(1.) that the executory devise over to the children of J. A., being before the Wills Act, created in them a tenancy in common for life only ; and (2.) that this executory devise affected the previous estate in fee given to E. C. to the extent of such life estates only, and that subject to the life estates the property

remained in E. C. and her heirs." The judges who decided that case were Blackburn J., Lush J., and Field J.; and, although they recognized that there was no authority absolutely in favour of the view that they adopted, they derived some support for it from the cases of *Watkins v. Weston* (1) and *Jackson v. Noble*. (2) Further, Blackburn J. in his judgment (3) referred to and applied the statement in 2 Powell on Devises, 3rd ed. p. 240, as follows: "' Where an estate is limited in derogation of a preceding estate, and to a partial though not total exclusion of the same,—as where a testator devised lands to his son B. in fee, and other lands to his son C. in fee, subject to a proviso that if either of his sons should die before marriage or before twenty-one, and without issue of their bodies, then he gave all the lands of such of his sons as should so die, &c., unto such of his said two sons as should the other survive,—it was held that the sons took in fee, subject to a limitation to the survivor for life, in case of either dying unmarried, or under twenty-one, and without issue; and that, one of them having attained twenty-one and died unmarried, the survivor was entitled to his moiety for life: ' citing *Hanbury v. Cockerell*. (4) Then the author points out that, ' Mr. Preston ' (a high authority) ' considers that the executory devise did not wholly defeat the original devise to the sons, but only introduced the limitation to the surviving son of an estate for life by way of exception out of the preceding estate in fee. To this important rule, namely, that an estate subject to an executory devise, to arise on a given event, is, on the happening of that event, defeated only to the extent of the executory interest, the only possible objection that can be advanced is the total absence of direct authority for it; for the books do not furnish a single example of its application.' " The view thus taken by the Court in that case is in many respects similar to that taken in such well-known cases as *Lassence v. Tierney* (5) and *Hancock v. Watson* (6) and is an authority binding me. And accordingly if the devises in the present case were legal devises I should be absolutely bound by authority to hold that the cutting down of

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(1) (1863) 3 D. J. & S. 434.

(2) (1838) 2 Keen, 590.

(3) 1 Q. B. D. 690.

(4) (1650) 1 Roll. Abr. 835.

(5) (1849) 1 Mac. & G. 551.

(6) [1902] A. C. 14, 22.

SARGANT J. the estate of James Lee Binfield by the gift over extended only to the extent of the life estates given to the children of Sarah Bird.

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Is then any difference made by the fact that the limitations in favour of Sarah Bird and her children are equitable limitations only? It is of course clear that under the law prior to the Wills Act a devise to trustees and their heirs upon trust for a beneficiary was sufficient to exclude the heir and to give the equitable fee simple to the beneficiary, although there were no words of inheritance attached to the beneficial gift (*Challenger v. Sheppard* (1); *Moore v. Cleghorn* (2)). But the reason for that appears to have been that the gift having been made to the trustees for the benefit of the beneficiary the estate of the latter must be presumed to be co-extensive with that of the former; and this reasoning does not apply to a case like this where the contest is between beneficiaries and the beneficial estate in question is only one of a number of beneficial estates one of which is on any construction an estate in fee simple (*In re Pollard's Estate* (3); *Knight v. Selby* (4)). Here, since on either construction of the gift over before me the beneficial interests will taken together be co-extensive with a fee simple, the reason for departing from legal rules of construction no longer exists, and the ordinary rule must apply that the construction of equitable interests follows the construction which would have been given to corresponding legal estates.

In my opinion, therefore, the children of Sarah Bird being all long since dead, the property reverted on the death of the survivor of them to the estate of James Lee Binfield and passed under his will, and the persons now entitled to the property are those who take under that will, and not those who would have taken under the gift over in the will of Thomas Jones to the children of Sarah Bird, and I make a declaration accordingly.

Solicitors: *Welman & Sons, for Last & Goodford, Windsor; Benham, Barrett, & Synnott; R. H. Behrend & Co.; Indermaur & Brown.*

(1) 8 T. R. 597.

(2) 10 Beav. 423; 12 Jur. 591.

(3) 3 D. J. & S. 541.

(4) 3 Man. & G. 92.

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Mines—Surface Owner—Right to Support—Conveyance of Land—Exception of Mines and Minerals—Liberty to Grantor to work and get all Minerals “in as full and ample a way as if these presents had not been executed”—Implied Right to let down Surface.

By an indenture dated in 1829 G. being seised in fee of certain estates conveyed a portion of them, consisting of farm lands and houses, to H. By the terms of the deed all the mines and minerals under the lands conveyed were excepted from the conveyance, full and free liberty being reserved to G., his heirs and assigns, to enter upon the lands, to sink pits and shafts, and to exercise all other powers for working and getting the minerals “in as full and ample a way and manner as if these presents had not been made and executed.” G. also covenanted to pay compensation for damage or injury done by digging and sinking pits and shafts or otherwise in exercise of the powers reserved to him. In an action by the plaintiffs, deriving title through H., for an injunction to restrain the defendants, claiming through G., from so working the minerals as to let down the surface:—

Held, that having regard to the terms of the reservation, which gave the grantor full liberty to work and get the minerals in as full and ample a way as before conveyance, the plaintiffs’ common law right to support was by necessary implication displaced, and the defendants had a right to let down the surface.

The rule laid down in *Love v. Bell* (1884) 9 App. Cas. 286, and *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.* [1906] A. C. 305, for the interpretation of similar words in Inclosure Acts has been explained as resting upon the change in the nature of the commoners’ interest effected by the inclosure. There is no ground for extending the principle to be found in these cases to the construction of deeds, where ordinary words ought to be given their plain and ordinary meaning.

Decision of Eve J. affirmed.

APPEAL from a decision of Eve J.

The plaintiffs brought this action for an injunction and to recover damages for injuries sustained through the defendants’ mining operations. They alleged that about two acres of land, part of their home farm, had been let down and become water-logged, and twelve cottages had sustained cracks and injuries caused by those operations, and they asked for damages and an injunction.

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The defendants claimed the right to let down the surface, and denied their liability for damages, but they paid 165*l.* into Court to make good any damage the plaintiffs might have suffered through their workings, with a denial of liability.

The severance of surface and minerals took place in 1829. At that date Sir Roger Gresley, of Drakelow Park, Derbyshire, was seised in fee simple of certain estates, having barred the entail therein, and by deed dated April 6, 1829, he sold and conveyed to William Harris, of Overseal, in the county of Leicester, various farms, farmhouses, closes, and cottages at the price of 13,122*l.* 16*s.*

The conveyance contained the following exception and reservation and covenant: "Save and except and always reserved by and out of these presents and the grant release and assurance hereby made to the said Sir Roger Gresley his heirs and assigns all and all manner of mines beds lymphs and delphs of coal iron ironstone and other minerals and the ores thereof respectively which are or have been or shall hereafter be opened found or discovered within or under the lands hereby granted and released or intended so to be or any of them with full and free liberty power and authority to and for the said Sir Roger Gresley his heirs and assigns and his and their agents servants and workmen with or without horses waggons carts or other carriages from time to time and at all times for ever hereafter to enter into and upon the said lands or any of them or any part thereof and to dig and sink such and so many pits and shafts as shall be proper for getting all such coal iron ironstone and other minerals or the ores thereof respectively and to stack or deposit the said coal ironstone and other minerals or the ores thereof respectively when raised on the land contiguous to such pits or shafts until the same can be conveniently removed and to erect any engine or engines for getting and laying dry such coal iron ironstone and other minerals or any of them or the ores thereof respectively and to make ditches drains soughs or dams where necessary for carrying on and working the said coal iron and other mineral works and to use either with or without horses waggons carts and other carriages all necessary and convenient roads for carrying off and selling the said coal iron

ironstone and other minerals or the ores thereof respectively and all other powers and privileges that shall or may be necessary or requisite in or for discovering raising working procuring and carrying away the said coal iron ironstone and other minerals and the ores thereof respectively in as full and ample a way and manner as if these presents had not been made and executed he the said Sir Roger Gresley hereby covenanting for himself his heirs and assigns from time to time to pay or cause to be paid to the said William Harris his heirs and assigns as a compensation for the damages or injury which may be done by digging and sinking the beforementioned pits or shafts or otherwise in the exercise of the powers or privileges hereby excepted and reserved to the said Sir Roger Gresley his heirs and assigns the sum of four pounds per annum for every acre and so in proportion for any less quantity than an acre of the land or ground which shall or may be entered upon and taken by the said Sir Roger Gresley his heirs or assigns for all or any of the purposes aforesaid And the said Sir Roger Gresley hereby further covenanting for himself his heirs and assigns that when all or any part of the land to be so entered upon and taken by him or them for all or any of the purposes aforesaid shall cease to be used for any of the same purposes the pits or shafts to be dug or sunk in exercise of the powers and privileges shall at the expense of the said Sir Roger Gresley his heirs or assigns be filled up to a solid level with the adjoining lands and the land to be so entered upon and taken and which shall so cease to be used as aforesaid shall at the like expense be in all other respects restored to the state and condition in which it was when so entered upon and taken as aforesaid or as near thereto as circumstances will admit the said annual payment of four pounds ceasing from the time at which the said pits or shafts shall be so filled up and the land shall be restored as near as may be to its former state and condition." The habendum was to William Harris in fee "except as hereinbefore is excepted."

The plaintiffs derived title through William Harris, and the defendants through Sir Roger Gresley. The question was whether according to the true construction of the deed of 1829 Sir Roger Gresley and parties claiming under him thereby

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reserved or acquired any right to let down the surface by working the minerals.

There was evidence that at some considerable time before the date of the deed the property in question formed part of a colliery district in which coal was being worked for commercial purposes, and that the mode of working then adopted was a modification of the long-wall system. Shafts were sunk to a depth sufficient to reach the shallow seams; from the shafts the coal was worked to a radius often extending to some three or four hundred yards, and when that radius of coal had been worked out, no steps were taken to stop the gap thus left; the pit was abandoned and its ultimate collapse followed, together with a large portion if not the whole of the excavated area. The result of that working was to dot the country with a series of saucer-like depressions. The evidence showed that in 1829 that was the current mode of working, and upon that evidence Eve J. came to the conclusion that all parties to the deed must have known that if the coal were worked in the then usual manner the creation of these depressions in the surface would inevitably follow. He accordingly decided that the defendants had the right to let down the surface; and then (lest another Court might arrive at a different conclusion) he proceeded to consider the question of damages, which he assessed at 93*l.* 8*s.* 4*d.* As, however, he decided the legal question against the plaintiffs, he dismissed the action, and the plaintiffs appealed on the question of their legal right only. They were satisfied with the judge's assessment of damages if they were legally entitled to recover any damages.

Hughes, K.C., and *Ashton Cross*, for the appellants. The common law right of the surface owner to the support of the surface can only be taken away by express words or necessary implication: *Love v. Bell* (1); *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.* (2) In *Butterley Co. v. New Hucknall Colliery Co.* (3) the lessees of an underlying seam of coal were held entitled to work it so as to let down an

(1) 9 App. Cas. 286.

(2) [1906] A. C. 305.

(3) [1910] A. C. 381.

overlying seam which had been previously leased by the same lessor to other parties, but there the circumstances were such as to imply the right to cause subsidence. There is no such implication here. In the present case at the time of the conveyance it was not known to the parties that subsidence was the inevitable result of long-wall working. Farwell L.J. in his judgment in *Butterley Co. v. New Hucknall Colliery Co.* (1) points out the distinction between that case and a case like the present. Having regard to then existing knowledge there is nothing to suggest that the parties to the deed of 1829 were contracting with the intention of reserving to the grantor a right to cause subsidence.

[LORD COZENS-HARDY M.R. Do you suggest any distinction between grant and reservation?]

If there be any it is in favour of the appellants. The respondents are not entitled to work the minerals if they cannot do so without damaging the buildings on the land or affecting the relative levels of the surface to the damage of the appellants.

Tomlin, K.C., and *MacSwinney*, for the respondents. This case depends upon the construction of the conveyance of 1829. It is submitted that by that deed the grantor expressly reserved the right to let down the surface; but if not, then the right should be implied as it was in the *Butterley Case*. (2)

In *Chamber Colliery Co. v. Twyerould* (3) words similar to those in the instrument under consideration were held to imply a right to let down the surface.

Apart from cases under Inclosure Acts, such as *Love v. Bell* (4), the *Butterknowle Case* (5), and *Buchanan v. Andrew* (6), there is no authority that words such as those to be found in the deed of 1829 are not to be given their natural meaning. In the Inclosure Act cases similar words have been held to have a restricted meaning. That mode of interpretation has been explained as resting upon the change in the nature of the commoners' interests effected by the inclosure.

(1) [1909] 1 Ch. 37.

(2) [1910] A. C. 381.

(3) See note, p. 268, post.

(4) 9 App. Cas. 286.

(5) [1906] A. C. 305.

(6) (1873) L. R. 2 H. L. Sc. 286.

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The case of *Duke of Buccleuch v. Wakefield* (1) is sui generis and forms no guide for the construction of an ordinary instrument of conveyance. *Benfieldside Local Board v. Consett Iron Co.* (2) is another Inclosure Act case. Lord Halsbury, commenting upon *Chamber Colliery Co. v. Twyerould* (3) in *New Sharlston Collieries Co. v. Earl of Westmorland* (4), clearly took the view that where there are words which will pass every right which the owner of both surface and minerals had before conveyance, those words are sufficient to imply the right to let down the surface.

As to the effect of the decision in the *Butterley Case*. (5) In construing an instrument it is permissible to have regard to the circumstances under which it was executed, and the Court will endeavour so to construe it as to give effect to the intention of the parties. In the case of a grant of mines in a district where it is not possible to work them commercially without letting down the surface it is a necessary inference that the parties intended to include a right to cause subsidence. In 1829 nobody contemplated that in this district it was possible to work coal without letting down the surface, and it is settled that an instrument must be construed having regard to the state of knowledge existing at the time of its execution. At the date of the deed the only known method of getting coal involved subsidence. That subsidence necessarily followed upon working was as clearly contemplated in this case as it was in the *Butterley Case*. (5) The reservation in *Chamber Colliery Co. v. Twyerould* (3) was in terms almost identical with that in the present case. Moreover the compensation clause goes to show that the grantor was to have the right to let down the surface. [*Dixon v. White* (6), *Mundy v. Duke of Rutland* (7), and *Price v. Plaskynaston Colliery Co.* (8) were also referred to.]

Hughes, K.C. in reply.

NOV. 12. SWINFEN EADY L.J. read the judgment of the COURT (Lord Cozens-Hardy M.R., Kennedy L.J., and Swinfen Eady L.J.). After stating the facts as above set out the judgment

(1) (1870) L. R. 4 H. L. 377.

(2) (1877) 3 Ex. D. 54.

(3) See note, p. 268, post.

(4) [1904] 2 Ch. 443, n.

(5) [1910] A. C. 381.

(6) (1883) 8 App. Cas. 833.

(7) (1883) 23 Ch. D. 81.

(8) (1885) 2 Times L. R. 90.

proceeded as follows: The law on the subject has now been definitely settled and established by several cases in the House of Lords.

In *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.* (1) Lord Loreburn made this general statement of the law: "Whenever the minerals belong to one person and the surface to another, the law presumes that the surface owner has a right to support, unless the language of the instrument regulating their rights, or other evidence, clearly shows the contrary. In order to exclude a right of support, the language used must unequivocally convey that intention, either by express words or by necessary implication. For the same presumption in favour of a right of support which regulates the rights of parties in the absence of an instrument defining them will apply also in construing the instrument when it is produced. If the introduction of a clause to the effect that the mines must be worked so as not to let down the surface would not create an inconsistency with the actual clauses of the instrument, then it means that the surface cannot be let down." And in the same case Lord Macnaghten said (2): "The result seems to be that in all cases where there has been a severance in title and the upper and lower strata are in different hands, the surface owner is entitled of common right to support for his property in its natural position and in its natural condition without interference or disturbance by or in consequence of mining operations, unless such interference or disturbance is authorized by the instrument of severance either in express terms or by necessary implication. This presumption in favour of one of the ordinary and most necessary rights of property holds good whether the instrument of severance is a lease, or a deed of grant or reservation, or an inclosure Act or award. To exclude the presumption it is not enough that mining rights have been reserved or granted in the largest terms imaginable, or that powers and privileges usually found in mining grants are conferred without stint, or that compensation is provided in measure adequate or more than adequate to cover any damage likely to be occasioned by the

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(1) [1906] A. C. 305, 309.

(2) [1906] A. C. 313.

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exercise of those powers and privileges." It is therefore a question in each case of the proper construction of the instrument of severance, and unless the power to let down the surface be found there expressly or by necessary implication, the common law right of the surface owner to support will prevail. The mere fact of giving very wide general powers to sink pits and to work, get, and carry away coal does not of itself establish a right to get rid of the common law right of the surface owner to have his surface undisturbed.

In the present case there is no right in express terms to let down the surface. But the question is whether such right is not a necessary implication from the language used. The vendor excepted all coal which had been or should thereafter be found or discovered, with full and free power and authority to enter upon the land, to sink pits and shafts for getting all the coal, to erect engines, make drains, use roads and all other powers and privileges for working, procuring, and carrying away the coal "in as full and ample a way and manner as if these presents had not been made and executed."

As Sir Roger Gresley was owner in fee, if he had not made and executed the conveyance to William Harris, he would have had a perfect right to let down the surface while working the minerals, and unless after conveyance he retained that right he would not have been able to work, procure, and carry away "in as full and ample a way and manner" as before conveyance. It was a necessary implication from the language used that he should have a right to let down the surface, if he was to be able to work, procure, and carry away the coal in as full and ample a way and manner as before conveyance.

If A. has the right to work coal so as to let down the surface, and B. is to have the same right as A., it follows by necessary implication that B. is to have the right to work coal so as to let down the surface; otherwise he would not have the same right as A.

To introduce a clause into the conveyance of 1829 to the effect that the mines must be worked so as not to let down the surface would create an inconsistency with the actual clauses of the instrument as it stands.

In the case of *Chamber Colliery Co. v. Twyerould* (1), decided by the House of Lords on July 20, 1893, it appeared that by a conveyance dated June 20, 1807, certain mines, veins, and beds of coal and cannel lying under certain tenements, closes, lands and grounds in the township of Oldham were sold and conveyed for 10,000*l.* together with full and free liberty, power, and authority "to enter upon the said tenements and lands and to use exercise and enjoy all privileges in the boring searching for draining laying dry getting banking selling carrying away and disposing of the same mines veins and beds of coal and cannel in as full large ample and beneficial a manner to all intents and purposes as they the said parties of the first second third and fourth parts or any of them could or might have done in case these presents had not been made." It was admitted by the parties (see the House of Lords Appendix, p. 38) that the vendors under the conveyance of June 20, 1807, who were the parties thereto of the first four parts, were immediately before and at the time of the execution of that indenture legally and equitably entitled as absolute owners to the fee simple of the hereditaments, the mines under and in which were thereby granted. It was there held by the House of Lords that the mine owners had power to let down the surface, but the judgment did not proceed alone upon the language of the portion of the deed to which I have already referred. Lord Watson said: "The grantors being proprietors *a centro usque ad caelum* could themselves have worked their minerals so as to cause subsidence of the surface; and they had it in their power to communicate the same right to their grantees." He then said that it was not necessary to determine whether the provision in the deed which I have already quoted was of itself sufficient to imply this right, which he considered to be a question of some nicety, as there were two other provisions in the deed which, taken in conjunction with the foregoing power, showed that the grantees were to have the right to work out the whole minerals and to cause subsidence of the surface. One of these provisions was an exception of the coal under existing buildings, which would have been unnecessary, if the grantees were bound to

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leave sufficient coal to support the surface. The other provision was a covenant to pay for any damage done or occasioned to any building by means of working the mines. This case was referred to by Lord Halsbury in *New Sharlston Collieries Co. v. Earl of Westmorland*. (1) Lord Halsbury there says: "My Lords, in the case which has been more than once referred to, the last case in this House, *Chamber Colliery Co. v. Twyerould* (2), I should have thought the language of the instrument was plain. I confess I do not follow my late lamented friend Lord Watson in speaking of it as a very nice question, because as I say, when you once have the broad proposition that the grantees are to have every right which the owner of both the surface and the minerals (who now purports to grant that right), had, I should have thought the ordinary proposition that a person may do as he likes with his own would carry you the whole way."

This then is a clear expression of the opinion of a very high authority that words such as occur in the present case are sufficient to authorize the letting down of the surface. In the *New Sharlston Case* (1) the language was not sufficient to give power to let down the surface; although wide general powers were conferred on the mine owners, there was no power given expressly or by necessary implication to deprive the surface owner of his right of support. In the argument of that case before North J. (3) it was urged by the mine owners that although they occasioned subsidence by their workings, they were only working the minerals in the usual way and as their grantor had worked them. But in his judgment North J. dealt with this as follows (4): "The defendants plead that they have worked the seams in question in precisely the same manner as they had previously to the grant been worked by the grantor. But the grantor was then owner of both surface and minerals and could make what terms she liked." In the Court of Appeal (5) this judgment of North J. was affirmed and was said to be a very full, accurate, and well considered judgment, and it was affirmed again in the House of Lords.

(1) [1904] 2 Ch. 443, n., 446, n.

(3) (1898) 79 L. T. 716.

(2) See note, p. 268, post.

(4) Ibid. 722.

(5) (1899) 80 L. T. 846.

In a case at nisi prius of *Price v. Plaskynaston Colliery Co.* (1) the Crown had granted the surface of certain lands reserving the minerals as follows: "Save and except out of this grant all mines and minerals, within, upon, or under" the said land, "with full power to Her Majesty, her heirs, successors, and assigns, and her and their servants and agents to enter upon, work, use and enjoy the same and every of them as fully and effectually to all intents and purposes as if this grant had not been made." Lopes J. expressed the opinion that this reservation gave the Crown the right to let down the soil.

The words used in the deed of 1829 are in their literal meaning clear and unambiguous, and that meaning is not excluded by any context, and we see no ground for introducing any supposed qualification or restriction. There is nothing in the deed to indicate it, or to define or limit it.

It was, however, urged that in cases relating to the rights of lords of manors under Inclosure Acts similar words had been held to have a restricted meaning. *Love v. Bell* (2) and *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.* (3) were referred to. It is difficult to appreciate exactly the grounds upon which the apparent departure from the language of the Inclosure Acts has been justified. Lord Macnaghten in the *Butterknowle Case* at p. 313 referred to the difficulty which had led to it, but nevertheless seemed to think that it reduced the provision in the statute to a dead letter, as indeed it does. Lord Halsbury too seems not to be quite satisfied with it. In *Butterley Co. v. New Hucknall Colliery Co.* (4) Lord Halsbury said: "All through the Lord Chancellor's judgment it will be noticed how carefully he points out that the nature of the commoner's interest is changed by the Act. And Lord Macnaghten obviously considers that that change has led—perhaps I should say misled—this House, and that the provision for the lord of the manor to enjoy the property as freely as before becomes a dead letter." In the *Butterknowle Case* (5) Lord Loreburn expressed the same view. After referring to

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(1) 2 Times L. R. 90.

(3) [1906] A. C. 305.

(2) 9 App. Cas. 286.

(4) [1910] A. C. 381, 383.

(5) [1906] A. C. 311.

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the words of the Act "as fully and freely as he or they might or could have had and enjoyed the same in case this Act had not been made," he said: "Mr. Neville pressed us to give full effect to these words. He said if the Act had not been passed, the lord had the right to let down the surface provided he left sufficient unbroken land to satisfy the old commoners' right of pasturage. That is so, and I might be entitled to assent to Mr. Neville's argument if I were not bound by the authority of *Love v. Bell* (1)."

These cases have laid down a rule for the interpretation of Inclosure Acts, and they have been explained as resting upon the change in the nature of the commoners' interest by the inclosure; but there is no ground for extending any principle which may be found in these cases to the construction of deeds, contrary to the rules for the construction of deeds which have been observed for centuries, and contrary to the definite opinion of Lord Halsbury in the *New Sharlston Case* (2) to which we have before referred. In the construction of deeds, ordinary words ought to be given their plain and ordinary meaning. Moreover, it has been laid down in cases too numerous to refer to that the common law right of support may be displaced by express provision, or by necessary or clear implication. There is necessary implication in the present case, and to say that such implication will not do, but that express language is necessary, would be to decide quite contrary to numerous cases of the highest authority.

In our opinion the appeal fails and is dismissed with costs.

Solicitors: *Thompsons, Quarrell & Jones; Kingsford, Dorman & Co., for Smith, Mammatt & Hale, Ashby-de-la-Zouch.*

NOTE.

March 3, 6, 7; July 20, 1893.

[HOUSE OF LORDS.]

CHAMBER COLLIERY COMPANY, LIMITED, APPELLANTS v.
TWYEROULD, RESPONDENT.

By a deed of grant in 1807, all the mines, veins, and beds of coal lying under certain lands in Oldham, Lancashire, and therein described (of which

(1) 9 App. Cas. 286.

(2) [1904] 2 Ch. 443, n.

certain surface lands now belonging to the plaintiff formed part), together with full and free liberty, power and authority, to and for the grantees, their heirs and assigns, agents and workmen, to enter upon the said lands and to use, exercise and enjoy all privileges in the boring, searching, getting and carrying away of such mines, &c., "in as full, large, ample, and beneficial a manner to all intents and purposes as" the grantors "could or might have done in case these presents had not been made," and also to get, bank, and dispose of all mines, veins, and beds of coal belonging to the grantees, their heirs, executors, administrators, and assigns, upon, within, or under the said lands, for which aforesaid purposes it should be lawful for the grantees, their heirs and assigns, to sink shafts, &c., and use and enjoy all such liberties and privileges for the getting, working, and disposing of the said mines as should be necessary, and as to the grantees, their heirs and assigns, should seem most proper and most conducive to the beneficial and most profitable working of the said mines, &c., they doing as little damage and injury to the said lands and "the surface soil and herbage thereof" as the nature of the case would admit of, and making satisfaction to the grantors, their heirs and assigns, for all unavoidable damage and spoil of ground to be occasioned by the exercising and enjoying the powers, liberties and privileges assured, by annual payments at the rate per acre therein mentioned, were granted to uses in favour of the grantees. And the grantees covenanted that, in case any damage should accrue "to any building erected or standing upon" the said lands by the working of the said mines, they should make compensation therefor to the grantors over and above the annual sums thereinbefore provided. The plaintiff was a lessee of the surface of some of the lands the mines under which were the subject of the above grant, and on this surface were standing a tripe-dressing manufactory and some cottages, most of which buildings had been erected since the date of the grant. The defendants, who derived title under the grantees of the mines, had, in working the coal, caused a subsidence of the surface of the plaintiff's lands, and consequent injury to the buildings thereon.

This action was brought by the plaintiff for an injunction to restrain the defendants from working the coal so as to injure his land or buildings, and for damages. The defendants contended that, upon the construction of the grant, they were entitled to work the coal without leaving a support for the surface, and that, in any case, the covenant as to compensation only extended to buildings on the land at the date of the grant.

The action came on for trial before Vaughan Williams J., sitting as an additional judge of the Chancery Division, who, on November 21, 1891, gave judgment refusing an injunction, but declaring that the plaintiff was entitled to compensation. From that judgment the defendants appealed. There was also a cross-appeal by the plaintiff asking for an injunction and damages in lieu of compensation.

On February 15, 1892, the Court (Lindley, Lopes, and Kay L.JJ.) considered it settled, by a long series of decisions, that a conveyance of mines, with full powers of working them, did not entitle the mineral owner to let down the surface without making compensation, unless the right to do so was conferred upon him by express words, or by necessary

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implication, by which was meant some provision which was plainly inconsistent with the absence of such a right. If all that could be said was that the provisions of the deed were consistent with such a right, and did not therefore exclude it, they would not go far enough; they must confer the right, if not in express terms, at least by the terms of the deed being plainly inconsistent with its absence. In other words, in a case of doubt, the right to let down the surface without paying compensation did not exist. Such was the principle laid down in *Davis v. Treharne* (1), *Dixon v. White* (2), and *Love v. Bell*. (3) Upon the construction of the deed of grant in the present case, the Court held that the defendants were bound to make compensation for injury to all buildings existing on the land, whether at the date of the grant or erected subsequently, and dismissed the defendants' appeal with costs.

Upon the plaintiff's cross-appeal the Court granted an inquiry as to damages on the footing of trespass.

The defendants then appealed to the House of Lords.

J. Fletcher Moulton, Q.C., and *C. Swinfen Eady*, for the appellants.

J. Rigby, Q.C., and *O. Leigh Clare*, for the respondent.

1893. July 20. LORD WATSON. My Lords, the respondent has right, under a sub-lease, with an unexpired term of 977 years, to a parcel of land about sixty acres in extent, the appellants being the owners of the subjacent seams of coal and cannel. Two questions were argued in this appeal: (1.) Are the appellants entitled to let down the surface of the land in the course of their mineral workings? (2.) If so, are they bound to compensate the respondent for the damage which he has sustained, or may yet sustain, through their exercise of that right?

The principles which must determine the main controversy between these parties are well established, but their application is by no means free from difficulty. Where the land, and the minerals which it contains, have become severed in title, the right to have it supported by the strata beneath is, in law, regarded as a natural incident of property in the surface. The onus is, in all such cases, upon the mineral owner who proposes to withdraw support, to show that the right to do so has been conferred upon him, either expressly or by plain implication, in the instrument by which the severance of the two estates was effected. The instrument to be considered in this case is a deed of indenture, dated June 20, 1807, by which the legal and equitable owners of the land, surface as well as minerals, conveyed certain of the minerals in fee, with extensive privileges of using the surface for the purpose of working them, to the persons from whom the appellants derive their title. The subjects conveyed are described in the deed of indenture as all and every the mines, veins, and beds of coal and cannel lying within and under the land, "save and except the mines of coal and cannel lying, and being under any buildings, courts, folds or yards standing upon or being parcel of the aforesaid tenements respectively, and which are hereby reserved out of these presents and the grant hereby made."

(1) (1881) 6 App. Cas. 460.

(2) 8 App. Cas. 833.

(3) 9 App. Cas. 286.

The powers conferred upon the grantees of using the land in connection with, and for the purposes of, their mineral workings are very wide. They are allowed full liberty to enter upon the lands, and to use, exercise, and enjoy all privileges in the boring, searching for, draining, laying dry, getting, banking, selling and disposing of their minerals in as full, large, ample, and beneficial a manner to all intents and purposes as the grantors could or might have done, "in case these presents had not been made." A licence is also given to drain, lay dry, get, bank, sell, and dispose of foreign coal belonging to the grantees, "through, upon, over, within and under the tenements, lands and grounds aforesaid." Then follows a power to sink pits and eyes, make roads and ways, erect fire and other engines, huts, smiths' cabins, &c., with all such liberties and privileges for the getting, working, vending, laying dry, and disposing of the mines, as shall be most conducive, or shall appear to the grantees to be most conducive, to the beneficial and most profitable working of the mines. It is then conditioned that these privileges are to be exercised with as little damage and injury to the lands and the surface soil, and herbage thereof, as the nature of the case will admit of, and that satisfaction is to be made to the grantors, and their heirs and assigns, for all unavoidable trespass, damage, and spoil of ground to be done or occasioned by the exercising or enjoying all and every or any of the "powers, liberties, or privileges aforesaid." Surface damage is to be paid for at certain annual rates per acre, the payment to cease wherever the land affected is soiled over, or made as good as it was before, or as near thereto as the nature of the case will permit of.

These provisions are followed by a variety of usual clauses, including covenants for quiet enjoyment and further assurance; and then there occur a series of covenants imposing obligations upon the grantees and their successors with respect to damage occasioned to buildings by their operations, removal of their works when these have become unserviceable, and the restoration of the surface, so far as practicable, to its original condition. One of these covenants is to the effect that, "in case any injury or damage shall accrue or be done or occasioned to any building erected or standing upon the said tenements, lands, and grounds, or any of them, by means of the working of the aforesaid mines, or the exercising all or any of the liberties and privileges hereby granted," then the grantees and their heirs and assigns shall "forthwith make full satisfaction for such said injury and damage" to the grantors, their heirs and assigns, over and above the sums of money already provided to be paid annually for trespass and damage.

The grantors, being proprietors *a centro usque ad caelum*, could themselves have worked their minerals so as to cause subsidence of the surface; and they had it in their power to communicate the same right to their grantees. Whether, as the appellants maintained, the privilege of "getting" the minerals in as ample and beneficial a manner as the grantors themselves could have done, is of itself sufficient to imply the right to let down the surface, in the course of working by ordinary methods and without negligence, is a question of some nicety, which I do not find it necessary to determine. It is sufficient to say that, in my opinion, the language employed to describe the privilege is quite capable of bearing the construction

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put upon it by the appellants, if the context shows it to have been used in that sense by the grantors of the conveyance. I find nothing in this case to oust the application of the well-known rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible. There are two provisions in the deed of indenture which taken together, and in conjunction with the privilege to which I have referred, appear to me to lead to the necessary inference that the grantors meant to give to their grantees the right to work out the whole minerals, and to cause subsidence of the surface whenever that result could not be avoided by careful working.

The first of these provisions is the exception from the grant of the coal and cannel under the buildings, courts, folds, or yards erected and standing upon the ground at its date. I do not regard that provision as being per se conclusive; but it does indicate an apprehension on the part of the grantors, that, but for the reservation, their existing buildings would be exposed to serious risk of injury, in the course of working contemplated. It was a precaution absolutely necessary for the protection of these buildings from injury, if their grantees had power to work out the whole minerals. If their grantees were under obligation to leave sufficient mineral to support the surface, there was no imperative, if any, necessity for it. The second and more important provision is to be found in the covenant to which I have already referred. It was suggested in the argument for the respondent, and the suggestion appears to have met with some favour in the Court of Appeal, that the buildings to which the covenant relates are identical with those under which the minerals had already been reserved, and that the sole object of the covenant was to secure indemnity for possible injury to these buildings through improper working attended by subsidence of the surface in their neighbourhood. Although the suggestion has the merit of ingenuity, I can discover no reason for attributing to the words of the covenant any other than their natural and ordinary meaning. They do not repeat or refer back to the expressions used in the earlier part of the deed to describe the sites or places overlying the excepted minerals; and I do not think it admits of doubt that the words of the covenant, taken in their natural sense, apply to every building existing on the surface of the land at the time when the subsidence occurs. Then the working of the minerals which the covenant contemplates as the cause of the damage to be compensated, is not described as improper working, but as working in exercise of all or any of the liberties and privileges granted by the deed. Exercise of a privilege does not primarily mean either violation or excess.

It was argued that the respondent was not affected by the covenant in question, inasmuch as it is of a personal character and could not run with the lands, and that, not being expressed as a condition, it could not be treated as a limitation or qualification of the right to work the mines. The argument appeared to me to proceed upon a misconception of the true nature of the covenant. In my opinion it does not profess to impose a

burden running with the lands. It is an inherent qualification of the coal owner's licence to work with the effect of letting down the surface, and provides that he shall not do so except upon the condition of compensating the owner for the time being of buildings which are injured by his operations. I do not think it is open to question that what is in form a covenant may nevertheless appear from the whole of the provisions of the instrument to be intended to operate as a condition also.

I am accordingly of opinion that the order of the Court of Appeal ought to be affirmed, with a variation, restoring it to the form in which it was pronounced by Vaughan Williams J. Notwithstanding this variation I think the appellants ought to pay the costs of the appeal.

My noble and learned friend Lord Hennen, who was present at the hearing of the appeal, has intimated his concurrence in the opinions which I have expressed.

LORD HERSCHELL L.C. My Lords, I am of the same opinion.

LORD MACNAGHTEN. My Lords, I concur.

LORD MORRIS. My Lords, I concur.

Order of the Court of Appeal varied in so far as it varied the judgment of Vaughan Williams J. Order of the Court of Appeal otherwise affirmed. The appellants to pay the costs of this appeal.

Lords' Journals, July 20, 1893.

Solicitors for appellants: *Woodcock Ryland & Parker, for Tweedale, Sons & Lees, Oldham.*

Solicitors for respondent: *Field, Roscoe & Co., for Wrigley, Claydon & Tristram, Oldham.*

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[1913 A. 705.]

Oct. 26, 27;
Dec. 10.

Judgment Creditor—Land in Mortgage—Writ of Elegit—Order appointing Receiver—Charge when operative—Payment of Rent in advance by Tenant—Right of Judgment Creditor—Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 13—Judgments Act, 1864 (27 & 28 Vict. c. 112), s. 1—Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), s. 5—Land Charges Act, 1900 (63 & 64 Vict. c. 26), s. 2.

Where land is subject to a mortgage and incapable of being delivered in execution under a writ of elegit the registration by a judgment creditor of a writ of elegit, is a registration of “a writ or order for the purpose of enforcing” the judgment within s. 2 of the Land Charges Act, 1900, and operates to create a charge on the land under s. 13 of the Judgments Act, 1838.

A judgment creditor issued and duly registered writs of elegit against the judgment debtor and subsequently obtained and duly registered an order appointing a receiver of the rents and profits of the judgment debtor's land which was subject to a mortgage and incapable of being delivered in execution under a writ of elegit. After the registration of the writs of elegit but before the appointment of the receiver the tenant of the land, having no notice of the judgment creditor's claim, paid rent in advance to the judgment debtor:—

Held (dissentiente Kennedy L.J. and reversing the decision of Sargant J. [1914] 2 Ch. 211), that the payment was not a good payment of rent as between the tenant and the judgment creditor.

APPEAL from a decision of Sargant J. (1)

This was an application on the part of the plaintiff that the respondent Alexander Keith might be ordered to pay to the receiver appointed in the action the sum of 157*l.* 10*s.* due for arrears of rent of Langham Lodge Farm in the county of Essex.

By four orders dated respectively October 31, 1912, November 30, 1912, January 15, 1913, and April 25, 1913, and made in an action of *Lord Ashburton v. Douglas and Others* [1911 A. 414], the defendant Nocton was ordered to pay to the plaintiff certain sums exceeding 21,000*l.*

On May 5 and 9, 1913, the plaintiff issued four writs of elegit

(1) [1914] 2 Ch. 211.

in the county of Essex and elsewhere, which were registered on May 6 and 9, under the Land Charges Registration and Searches Act, 1888. The whole of the defendant's lands, including Langham Lodge Farm, were subject to legal mortgages and incapable of being delivered in execution under a writ of elegit; and on May 27, 1913, the plaintiff brought this action by originating summons against the defendant for a declaration of charge and the appointment of a receiver.

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On May 30 an interim receiver was appointed of the rents and profits of the defendant's lands in the county of Essex, including Langham Lodge Farm, and elsewhere, without prejudice to the rights of prior incumbrancers, and the tenants of the said lands were thereby ordered to attorn and pay their rents in arrear and growing rents to the receiver. By an order dated June 6, 1913, the interim receiver was continued; and these two orders were shortly afterwards registered under the Land Charges and Searches Registration Act, 1888.

On May 28, 1913, Alexander Keith, who was the tenant of Langham Lodge Farm, at the request of the defendant paid to him in advance the sum of 157*l.* 10*s.* on account of the half-yearly rent falling due on September 29, 1913. At that date he had no notice of the plaintiff's claim, the first notice he received being notice of the appointment of the receiver given to him on June 4.

The plaintiff alleged that the payment of the 157*l.* 10*s.* to the defendant was not a valid payment of rent as between the plaintiff and Alexander Keith.

Sargant J. held that registration of an ineffective writ was not a compliance with s. 2 of the Land Charges Act of 1900, which must be read together with s. 5 of the Land Charges Registration and Searches Act, 1888, requiring registration of writs "affecting land," and that the prepayment of rent was good as against the plaintiff.

The plaintiff appealed.

P. O. Lawrence, K.C., and *A. àBeckett Terrell*, for the appellant. By the registration of the writs of elegit the plaintiff acquired a valid charge on the defendant Nocton's land; the

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arrangement for prepayment of rent between Nocton and Keith is not effectual as against the plaintiff, and he is entitled to recover the 157l. 10s. It is admitted that the writs were regular and were properly registered. Sect. 13 of the Judgments Act, 1838 (1), provides that a judgment against any person shall operate as a charge upon all land to which such person shall be entitled, but the charge is not to be enforced for a year. That section is still in force, and the Court will appoint a receiver to protect the property till the end of the year.

Under s. 1 of the Judgments Act, 1864, a judgment was not to

(1) The Judgments Act, 1838, s. 13, provides that a judgment against any person shall operate as a charge upon all lands "of or to which such person shall at the time of the entering up such judgment, or at any time afterwards, be seised, possessed, or entitled, for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder or expectancy . . . and every judgment creditor shall have such and the same remedies in a Court of Equity against the hereditaments so charged by virtue of this Act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the said hereditaments and had by writing under his hand agreed to charge the same with the amount of such judgment debt and interest thereon: provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment . . ."

Judgments Act, 1864, s. 1: "No judgment, statute or recognisance to be entered up after the passing of this Act shall affect any land (of whatever tenure) until such land

shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority, in pursuance of such judgment, statute or recognisance."

Land Charges Registration and Searches Act, 1888, s. 5: "There shall be established and kept at the office of the Land Registry a register of writs and orders affecting land, and there may be registered therein, in the prescribed manner, any writ or order affecting land issued or made by any Court for the purpose of enforcing a judgment, statute, or recognisance, and any order appointing a receiver or sequestrator of land."

Land Charges Act, 1900, s. 2: "A judgment or recognisance, whether obtained or entered into on behalf of the Crown or otherwise, and whether obtained or entered into before or after the commencement of this Act, shall not operate as a charge on land, or on any interest in land, or on the unpaid purchase money for any land, unless or until a writ or order for the purpose of enforcing it is registered under section 5 of the Land Charges Registration and Searches Act, 1888."

Sect. 5 repeals (*inter alia*) s. 1 of the Judgments Act, 1864.

affect land until it had been actually taken in execution, and it was held that in the case of an equity of redemption, such as this, the delivery of execution is by the appointment of a receiver under the words "other lawful authority." A writ of *elegit* has to be issued under s. 11 of the Judgments Act, 1838. It is immaterial to the sheriff of what county it is addressed. By the Judgments Act, 1839, it had to be registered, and re-registered every five years. By the Law of Property Act, 1860, s. 1, no judgment is to affect land unless a writ has been registered. The Judgments Act, 1864, still further restricted the rights of judgment creditors and provided that the charge created by s. 13 of the Act of 1838 should be postponed till the land was actually delivered in execution. By s. 2 "land" was to include all hereditaments. Instances of what have been held to amount to delivery are given in Carson's Real Property Statutes, 2nd ed. p. 506. By s. 5 of the Land Charges Registration and Searches Act, 1888, "a register of writs and orders affecting land" is to be kept at the office of the Land Registry, and entries are to be made in the name of the person whose land is affected. The practice is now regulated by the Land Charges Act, 1900, and the moment a writ or order is registered at the Land Registry the charge under s. 13 of the Act of 1838 arises.

It is said that a writ of *elegit* is not a writ or order affecting an equitable interest in land; but we submit that it does affect an equitable interest in land and is capable of registration: *In re Cowbridge Ry. Co.* (1); *Guest v. Cowbridge Ry. Co.* (2); *Champneys v. Burland.* (3) Under s. 2 of the Act of 1900 the thing to be registered is a "writ or order for the purpose of enforcing" a judgment. A writ of *elegit* answers that description, even though it is ineffective as regards an equity of redemption. Delivery in execution of an equity of redemption under the Act of 1864 was by the appointment of a receiver: *Hatton v. Haywood* (4); *Anglo-Italian Bank v. Davies.* (5) Since the Judicature Acts it is not necessary for a judgment creditor, in order to obtain the appointment of a receiver, to previously sue

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(1) (1868) L. R. 5 Eq. 413.

(3) (1870) 19 W. R. 148

(2) (1868) L. R. 6 Eq. 619.

(4) (1874) L. R. 9 Ch. 229.

(5) (1878) 9 Ch. D. 275.

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out a writ of elegit: *Ex parte Evans* (1); *In re Pope*. (2) A judgment creditor who wanted to get execution had to prove his case, and show legal impediments and that it was just and convenient that a receiver should be appointed: *Neate v. Duke of Marlborough* (3); *In re Shephard* (4); *Morgan v. Hart*. (5) An order appointing a receiver is not an actual delivery in execution of a remainder in real estate: *In re Harrison and Bottomley*. (6) The words "writ or order" in s. 2 of the Act of 1900 do not necessarily mean an appropriate order. The object of registration is to obtain security for purchasers, and that result is secured by providing a registry which they can search. These writs of elegit were proper writs properly issued and properly registered. The fact that the debtor only has an equitable estate is immaterial. The office decline, as a rule, to register writs of fi. fa. The limits of the operation of the Act of 1900 are shown by *In re Badger*. (7) We have a charge just as much as if it were a charge in writing and our remedy is foreclosure or sale. At all events the receiver was appointed before the rent became due, and the arrangement between Nocton and Keith that the latter should pay rent in advance is not binding on us. As against a mortgagee it was not payment of rent at all: *De Nicholls v. Saunders* (8); *Cook v. Guerra* (9); *Vacuum Oil Co. v. Ellis*. (10) In *Green v. Rheinberg* (11) the lessor had released the rent before the mortgage and the mortgagee had notice of the circumstance.

Martelli, K.C., and *J. E. Harman*, for the respondent Keith. The decision appealed from is right, and a reversal of it would upset the well-established practice. The Act of 1900 was not intended to revolutionize the law on this subject. The plaintiff only became entitled to a charge on the defendant's land, at the earliest, upon the registration of the order of May 30 appointing the interim receiver, i.e., after the payment of the 157l. 10s. On the 28th, when the payment was made, there was no charge on the land in favour of the plaintiff, and the payment was good

(1) (1879) 13 Ch. D. 252.

(2) (1886) 17 Q. B. D. 743.

(3) (1838) 3 My. & Cr. 407.

(4) (1889) 43 Ch. D. 131.

(5) [1914] 2 K. B. 183.

(6) [1899] 1 Ch. 465.

(7) [1913] 1 Ch. 385.

(8) (1870) L. R. 5 C. P. 589.

(9) (1872) L. R. 7 C. P. 132.

(10) [1914] 1 K. B. 693.

(11) (1911) 104 L. T. 149.

against the plaintiff: *Green v. Rheinberg*. (1) The "writ or order for the purpose of enforcing" a judgment referred to in the Act of 1900, s. 2, means an effective writ or order, that is one capable of "affecting land," which is the expression used in s. 5 of the Act of 1888. A writ of elegit is a useless form in the case of an equitable interest: *Ex parte Evans* (2); and probably these writs ought not to have been registered; but whether that be so or not, registration of an ineffective writ cannot give a charge. There was an inchoate right to a charge, but it did not become operative: *In re Anthony*. (3) The plaintiff's proper course was to obtain a receiver; and that was done too late. Sect. 2 of the Act of 1900 does not alter the law, nor does registration make a process effective which without it would be useless, or make it take precedence over a receiver. Our construction of the section is more reasonable than the appellant's. It only substituted registration for actual delivery in execution. A writ of fieri facias might be put on the register, but it would not give a charge. A judgment creditor is not in the position of a legal mortgagee; he stands in no better position than a person entitled to an equitable charge, who is not entitled to receive the rents and profits, his only remedy being to apply to the Court for the appointment of a receiver: *Seymour v. Lucas* (4); *Wills v. Luff*. (5)

P. O. Lawrence, K.C., in reply.

Cur. adv. vult.

Dec. 10. The following written judgments were delivered.

LORD COZENS-HARDY M.R. This appeal raises an important and, so far as I am aware, a novel point as to the circumstances in which, and the time at which, a judgment operates as a charge upon land. It is necessary to consider the various statutes dealing with judgments.

The Judgments Act, 1838, is the first to which I shall refer. It greatly enlarged the rights and powers of a judgment creditor. By s. 11 the sheriff is empowered under a writ of elegit to make

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(1) 104 L. T. 149.

(3) [1892] 1 Ch. 450, 455.

(2) 13 Ch. D. 252, 260.

(4) (1860) 1 Dr. & Sm. 177.

(5) (1888) 38 Ch. D. 197.

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and deliver execution of all such lands, tenements, rectories, tithes, rents and hereditaments, including copyholds, as the person against whom execution is so sued or any person in trust for him was seised or possessed of at the time of entering up judgment or at any time afterwards. This section deals with what the sheriff can do under an *elegit*.

Sect. 13 has nothing to do with the sheriff. It makes a judgment operate as a charge upon present or future lands and hereditaments of or to which the debtor is seised, possessed, or entitled for any estate or interest whatever at law or in equity, "whether in reversion, remainder or expectancy." And the judgment creditor is to have the same remedies in a Court of Equity against the hereditaments so charged as if the debtor had power to charge, and had by writing under his hand charged, the hereditaments with the amount of the judgment debt and interest. It will be observed that the charge given by s. 13 extends to estates and interests not subject to *elegit*—for example to an equity of redemption and to a legal remainder in fee. By s. 19 a purchaser is not to be affected by a judgment unless and until it is registered in the Common Pleas. By s. 1 of the Act of 1860 a purchaser, whether with or without notice, is not to be affected by a judgment unless a writ of execution or other due process has been issued and registered in the Common Pleas in the name of the judgment creditor (s. 2). This Act apparently cut down, to some extent, s. 13 of the Act of 1838. The Act of 1864 effected a great change. By s. 1 no judgment was to affect land "until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority." These words gave rise to much difficulty. It was ultimately decided that the old jurisdiction of the Court of Chancery to give relief where an *elegit* could not be effective by reason of a legal impediment—such as a mortgage in fee—was not taken away, and that in a proper suit a receiver might be appointed, and that such an appointment was a delivery in execution by lawful authority. Since the Judicature Act it has been held that a receiver may be appointed in the action in which judgment has been obtained and without the necessity of taking out an *elegit*. But it has also been held that a receiver

cannot be appointed of a legal remainder in fee : *In re Harrison and Bottomley*. (1) And there are other estates and interests mentioned in s. 13 of the Act of 1838 to which neither an *elegit* nor a receiver can be made applicable. This was a serious diminution of the rights and powers of a judgment creditor. By s. 4 the registration of writs of execution was to be in the name of the debtor and not of the creditor. By the Land Charges Registration and Searches Act, 1888, a registry of writs and orders "affecting land" (a word which includes hereditaments corporeal and incorporeal) was established in the Land Registry Office. And by s. 6 the writ or order and any delivery in execution are void against a purchaser for value unless the writ or order is registered in pursuance of the Act. By the Land Charges Act, 1900, s. 2, a judgment is not to operate as a charge on land unless or until a writ or order "for the purpose of enforcing it" is registered under s. 5 of the Act of 1888. By s. 5 the enactments in the schedule are repealed. The schedule includes, *inter alia*, s. 19 of the Act of 1838, s. 2 of the Act of 1855, ss. 1 to 5 of the Act of 1860, and ss. 1, 2, and 3 of the Act of 1864. Sect. 13 of the Act of 1838 is not in the schedule.

What is the present operation of this series of statutes? It seems to me that s. 13 of the Act of 1838, which until 1864 was in full operation, remains in full force except so far as it has been expressly altered. The Act of 1864, which by s. 1 imposed a condition precedent upon the arising of a charge, has been expressly repealed. The only relevant section is s. 2 of the Act of 1900. It says, in effect, that if a judgment creditor purposes to enforce his judgment against land he must register a writ or order in the Land Registry. There is nothing requiring delivery in execution. A writ of *elegit* is such a writ as, in its nature, is proper to affect land. The writ is general in its terms. It does not specify particular land, although the return to an inquisition must either specify certain land or return *nihil*. If this view is sound, it restores to s. 13 its full force as a charge upon estates and interests to which neither a receiver nor an *elegit* is applicable—such as a legal remainder in fee. Nor is there any inconvenience to an intending purchaser. He has only to search in the one

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registry, and unless it contains an entry of a judgment he will be safe. Sargant J. has held that, in order to affect any particular land, it must be shown that in the case of a legal estate you have issued and registered a writ of elegit, and that in the case of an equity of redemption you have obtained and registered an order appointing a receiver. With great respect, I am unable to assent to this view. I am not prepared to hold, in effect, that a judgment creditor is powerless against, for example, a legal remainder in fee, which cannot be reached either by an elegit or by a receiver. It remains to state the facts which give occasion to this litigation. [His Lordship stated them.] If the plaintiff's charge took effect and became operative before Keith's payment, the plaintiff is right. If the charge took effect and became operative only on the appointment of a receiver, i.e., two days after the payment, the plaintiff is wrong. For the reasons I have already stated, I think the former is the true view. The judgment of Willes J. in *De Nicholls v. Saunders* (1) is clear and decisive, unless a distinction can be made good on the ground that in that case the mortgage was legal, whereas here it is equitable. But the equitable charge was followed by the appointment of a receiver, who, as against the mortgagor, was entitled to receive all rent subsequently due and payable.

With great respect to Sargant J. and to Kennedy L.J., who agrees with Sargant J., I think the appeal must be allowed and an order made for payment in the terms of the application. The respondent must pay the costs here and below.

KENNEDY L.J. The material facts in this case are not in dispute. [His Lordship stated them and proceeded:]

Upon these facts, the decision of the Court as to Lord Ashburton's claim to treat Mr. Keith's payment to the defendant on May 28 as an invalid payment of rent as between the plaintiff and Mr. Keith appears, I believe, to the whole Court to depend upon the effect which ought to be given to the registration on May 6 and 9, under the Land Charges Registration and Searches Act, 1888, of the writs of elegit issued by the plaintiff a few days previously. Did the orders obtained by the plaintiff in the

(1) L. R. 5 C. P. 589.

action of *Lord Ashburton v. Douglas*, upon the writs of *elegit* being thus registered, operate immediately upon the equitable interest of the defendant as mortgagor in Langham Lodge Farm so as to render Mr. Keith's payment to the defendant on the following May 28, being made after the registration of those writs, invalid as against the plaintiff, and so that Mr. Keith, though having, as I have said, no notice of any claim of the plaintiff when in perfectly good faith he paid his landlord 157*l.* 10*s.* on May 28, 1913, must now pay the same sum to the receiver appointed two days later by the order of the Court in the present action? If, on the contrary, it ought to be held that the defendant's equitable interest in Langham Lodge Farm was not affected, so as to have this result, until May 30, when the plaintiff obtained an order for a receiver, the payment by Mr. Keith on May 28 was a good payment as between himself and the plaintiff, and the plaintiff's claim on the summons out of which this appeal arises fails. Sargant J. came to the conclusion that the latter was the true view; and, but for the fact that I am, and, I need not say, with much diffidence, differing from the other members of this Court, I should have been content to adopt as my own the judgment delivered by the learned judge. As this disagreement of judicial opinion exists, it is my duty, I think, to state my view of this case in my own way.

The matter in debate really is the true interpretation of the Land Charges Act, 1900, s. 2, sub-s. 1. There are two earlier statutory enactments which have a bearing upon the case, the Judgments Act, 1838, s. 13, and the Land Charges Registration and Searches Act, 1888, s. 5, to which I shall therefore have also to refer. The Judgments Act, 1864, s. 1, which formed the chief topic for consideration in the cases of *Hatton v. Haywood* (1), *Anglo-Italian Bank v. Davies* (2), *Ex parte Evans* (3), and *In re Pope* (4), of the first three of which Sargant J. has stated the effect in the course of his judgment, possesses now a merely historical interest, as that enactment was expressly repealed by s. 5 of the Land Charges Act, 1900. It is sufficient

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(3) 13 Ch. D. 252.

(2) 9 Ch. D. 275.

(4) 17 Q. B. D. 743.

C. A. in reference to this statute and to these decisions to say, as
 , 1914 Sargant J. has said, that, if s. 1 of the Judgments Act, 1864,
 ASHBURTON were still in force, it is clear in the present case that there would
 (LORD) have been no charge on the defendant's equitable interest in the
 v. land until the appointment of the receiver on May 30, 1913, and
 NOOTON. that the payment by Mr. Keith on May 28 would have taken
 Kennedy L.J. place before the plaintiff had acquired any charge on the land.
 Sect. 13 of the Act of 1838(1) contains the most material provision. In regard to the latter portion of this enactment affecting equitable interests, it may be worth while to note two decisions. In the first, *Smith v. Hurst* (2), given by Knight Bruce V.-C. in 1845, he held that, the judgment not being a year old, he could not appoint a receiver. In *Seymour v. Lucas* (3) Kindersley V.-C. said that the judgment creditor having the charge might institute a suit to obtain the benefit of his charge, but he could have no right to receive the rents, nor would they be vested in him. Some modifications of the provisions of this Act were introduced by later Judgments Acts earlier than 1864, but they do not, I think, affect that statute so far as it touches the present case.

The Judgments Act, 1864, as I have already said, is no longer in force. It enacted, inter alia, that a judgment should not affect any land, of whatever tenure, until such land should be actually delivered in execution by virtue of a writ of elegit or other lawful authority in pursuance of such judgment. The Land Charges Registration and Searches Act of 1888, s. 5, sub-s. 1, so far as its provisions are material in the present case, created at the Land Registry Office a register of writs and orders affecting land, and permitted the registration therein of any writ or order affecting land issued or made by any Court for the purpose of enforcing a judgment and any order appointing a receiver or sequestrator of land. In the year 1900 was passed the Land Charges Act. By s. 5 the provisions of the Judgments Act, 1864, which I have quoted were repealed, and therefore it ceased to be necessary, in order that land might be affected by a judgment under s. 13 of the Judgments Act, 1838, that it should have been actually delivered in execution by virtue of a writ of

(1) See note ante, p. 276.

(2) (1845) 1 Coll. 705.

(3) 1 Dr. & Sm. 177.

elegit or other lawful authority in pursuance of such judgment. But, by s. 2, the true interpretation of which is the subject of debate in the present case, this Act provided that a judgment, whether obtained before or after the commencement of the Act, "shall not operate as a charge on land, or on any interest in land, or on the unpaid purchase money of any land, unless or until a writ"—and then come the words which I think deserve notice—"or order for the purpose of enforcing it is registered under section 5 of the Land Charges Registration and Searches Act, 1888."

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What is the true effect of this legislation where a judgment creditor, seeking to enforce his judgment and to affect an equitable interest in land belonging to the judgment debtor, simply registers a writ of elegit? It is clear that in the case of a legal interest in land the writ of elegit would, by virtue of this section, operate as a charge from the date of the registration instead of operating, as it would have done under the repealed Act of 1864, only from the time of actual delivery in execution. Has the section not only done this, but, as the plaintiff contends, brought within the operation of the writ of elegit an equitable interest in land which could not formerly have been and cannot now be delivered in execution under such a writ? Sargant J. has put this question to himself and answered it in the negative, and the counsel for the appellant have failed to satisfy me that the learned judge was wrong in doing so. The words "writ or order for the purpose of enforcing" the judgment ought, in my view, to be read as meaning a writ or order in its nature capable of affecting the particular interest in land which the debtor has, to use the language of s. 5 of the Land Charges Registration and Searches Act, 1888. A writ of elegit, as the learned counsel in his argument in the Court below properly admitted, is ineffective and impotent as regards an equity of redemption. In 1879, in *Ex parte Evans* (1), Thesiger L.J., quoting the language used by Sir George Jessel M.R. in *Anglo-Italian Bank v. Davies* (2), said (3): "The issuing of a writ of elegit in the case of an equitable interest is a useless and absurd form"; and James L.J., giving judgment in the same case, observed: "I desire also to express

(1) 13 Ch. D. 252.

(2) 9 Ch. D. 275.

(3) 13 Ch. D. 260.

C. A. my entire concurrence with what was said by the Master of the
 1914 Rolls, that to require a writ of elegit to be issued now in the case
 ASHBURTON of an equitable interest in land would be a mere idle form." It
 (LORD) matters not whether the lands be freehold or leasehold (see the
 v. cases collected in Carson's Real Property Statutes, 2nd ed. p. 489).
 NOCTON. The view which the learned judge in the Court below has adopted.
 Kennedy L.J. is, I venture to think, not only more agreeable to the natural
 meaning of the terms of the section which we have to consider
 and more intrinsically reasonable, for the reasons which he has
 so clearly and concisely stated in his judgment, than that for
 which the appellant contends, but it is also nowise less expeditious
 or less advantageous to the judgment creditor. It was decided
 more than thirty years ago, as I understand the cases, that it was
 unnecessary for a judgment creditor who seeks to obtain equitable
 execution in respect of the judgment debtor's equitable interest in
 land previously to sue out an elegit, as the plaintiff in the present
 case chose, for some reason or other (I use that expression in view
 of the judgment in *Ex parte Evans* (1)), to do. All that he has
 to do in order to charge the judgment debtor's interest is to obtain,
 as he can do at once, and to register such an order as the plaintiff
 did afterwards obtain on May 30, 1913. That order is plainly
 within the language of the section, "an order for the purpose of
 enforcing the judgment," and within s. 5, sub-s. 1, of the Land
 Registration and Charges Act, 1888, "an order affecting land
 issued or made by any Court for the purpose of enforcing a judg-
 ment," which will, from the date of its registration under the
 Land Charges Act, 1900, operate as a charge upon the judgment
 debtor's equitable interest in the land. Unfortunately for him-
 self, in my view, the plaintiff in the present action did not obtain
 such an order until May 30, and registered it at an even later
 date, and he thereby did not become entitled to impeach the
 validity of the payment made by the judgment debtor's tenant
 in good faith on the earlier date of May 28, and if so, this appeal
 ought to be dismissed. My view, however, is, as I have already
 said, only that of the minority in this Court, and, therefore, this
 appeal must be allowed.

(1) 13 Ch. D. 252.

SWINFEN EADY L.J. This is the plaintiff's appeal from the refusal of Sargant J. to make any order upon the plaintiff's summons issued on March 21, 1914, whereby he asked that Alexander Keith might be ordered to pay to the receiver appointed in this action the sum of 157*l.* 10*s.* due from him for arrears of rent of Langham Lodge Farm, Essex, in respect of his occupation thereof from March 25, 1913, to September 29, 1913.

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The first question which arises is whether the plaintiff, by his four several writs of *elegit* into the county of Essex and elsewhere, registered on May 6 and 9 under the Land Charges Registration and Searches Act, 1888, acquired a charge upon the defendant's lands in Essex and elsewhere, which were then subject to legal mortgages, and in which the defendant had only an equity of redemption. This question depends upon the true construction of the statutes affecting the matter.

By the Judgments Act, 1838, s. 13, a judgment is to operate as a charge upon any interest whatever in any land and hereditaments which the defendant has, whether legal or equitable, and whether in possession, reversion, remainder, or expectancy, as if the defendant had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same, with the amount of such judgment debt and interest thereon. If this were the only provision, the judgment obtained by the plaintiff against the defendant would be a charge upon the defendant's equities of redemption in lands and hereditaments. It is, however, provided by the Land Charges Act, 1900, s. 2, that a judgment shall not operate as a charge on land, or on any interest in land, unless or until a writ or order for the purpose of enforcing it is registered under s. 5 of the Land Charges Registration and Searches Act, 1888.

The plaintiff duly issued writs of *elegit*, which are writs of execution, for the purpose of enforcing his judgment, which is for a very large sum, and these were registered in the manner required by s. 5 of the Land Charges Registration and Searches Act, 1888. It would thus appear that the plaintiff had taken all necessary steps to comply with the conditions necessary to enable his judgment to operate as a charge on the defendant's interest

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in lands and hereditaments. It was, however, urged that although the elegits were writs issued for the purpose of enforcing the judgment, yet they were ineffectual for that purpose; that as equities of redemption in lands cannot be extended under elegits the defendant's land could not have been actually delivered in execution by virtue of these writs alone, and that s. 2 of the Act of 1900 is not complied with, unless the writs of execution issued and registered are such as are capable of affecting the land sought to be charged, and enabling it to be taken in execution. I find no warrant or justification for this contention in the Act of 1900. It is true that under the Judgments Act, 1864, future judgments were not to affect land until such land should have been actually delivered in execution, and every writ by virtue whereof any land should have been actually delivered in execution was required to be registered, but these provisions have been repealed by the Land Charges Act, 1900, and there is not now any statutory provision requiring actual delivery in execution before the judgment binds land. The only limitation or qualification upon s. 13 of the Act of 1838 is s. 2 of the Act of 1900 requiring "a writ or order for the purpose of enforcing" the judgment to be registered. A writ of elegit, issued to enforce the judgment, and duly registered, is, in my opinion, a compliance with this section, and it is not a further condition precedent to the judgment charging all lands of the debtor and every interest therein that the debtor should have some land unincumbered which could be extended under the elegit.

It was contended that the register established by s. 5 of the Act of 1888 was only a register of writs and orders affecting land, and that only such writs and orders could be entered therein; but under s. 2 of the Act of 1900 any writ or order for the purpose of enforcing a judgment does become, when registered, a writ or order affecting land, because it complies with the condition required to enable the charge, given by s. 13 of the Act of 1838, to attach.

In my opinion, the present law is correctly stated at p. 515 of the 2nd edition of Carson's Real Property Statutes: "(3.) When a writ or order for the purpose of enforcing the judgment has been obtained and registered under the Land Charges Act, 1888,

but not before, (s. 2 of the Land Charges Act, 1900) the charge created by s. 13 of the Judgments Act, 1838, will arise, and may be enforced as above mentioned (see ante, p. 495). For this purpose, actual delivery in execution is no longer necessary." This was the position with regard to Crown debts under the Crown Suits Act, 1865 (28 & 29 Vict. c. 104), ss. 48 and 49. These sections are now repealed by the Act of 1900, which places Crown debts in the same position as debts due to subjects of the Crown. In each case it is sufficient to enable a judgment to operate as a charge on the judgment debtor's interest in land that a writ for the purpose of enforcing the judgment be issued and registered. Again, s. 4 of the Land Charges Act, 1900, shows that the statute contemplates further instruments being registered under the Act beyond those which could be registered under the Act of 1888. It was contended that some hardship might arise if this were the law, but I see no ground for this contention. On the contrary, it much facilitates enforcing the payment of judgment debts, and gives the creditor a simpler and more effectual remedy than requiring the land to be actually delivered in execution. Moreover, the provision requiring registration "in the name of the person whose land is affected by the writ or order registered" (Act of 1888, s. 5, sub-s. 2) is sufficient to prevent any injustice to innocent third parties, as any prudent person engaged in a transaction of dealing with land would search the register before completing any conveyance or mortgage. Again, very great difficulties would arise in actual practice if the view which was upheld in the Court below were to prevail. A judgment creditor may not, and probably does not, usually know the nature or extent of his debtor's interest in land, and perhaps not even the county where it is situate. Is he to issue a writ of elegit to the sheriff of every county? Again, how is he to find out about his debtor's land if, before registering any writ of execution, he is to satisfy the registering officer that such writ is actually capable of reaching or affecting some interest in definite land then belonging to the debtor? In my opinion, the judgment of Sargant J. on this first point was erroneous. By the issue and registration of the writs of elegit, the plaintiff duly acquired a charge on all the

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interests of the defendant in lands and hereditaments as if the defendant "had by writing under his hand agreed to charge the same."

The other question which arises is whether the payment by the tenant to the judgment debtor of rent in advance, after the plaintiff had obtained a charge, but before the appointment of a receiver, was a valid payment against the plaintiff. It was conceded that if the plaintiff's security had been a legal mortgage such a payment of rent in advance would not be valid against the mortgagee. A legal mortgage carries with it the right to the accruing rent, if the mortgagee intervenes and claims the rent before it has been paid to the mortgagor, after the due date, and a prepayment to the mortgagor before the due date is not valid against a legal mortgagee: *De Nicholls v. Saunders*. (1) It was insisted, however, that as the plaintiff's charge is an equitable one only, such a payment was valid against him. I see no ground for any distinction in this respect between legal and equitable mortgages, as an equitable mortgagee by obtaining the appointment of a receiver can enforce payment of rent due from tenants. In the present case, the appointment of a receiver was obtained before the rent became due. In *Seymour v. Lucas* (2) a judgment creditor was held to have no right to receive the rents, as, although he had a charge on the land, he had not taken any steps to enforce it. Here the plaintiff obtained the appointment of a receiver before the rent was due, and duly demanded it. A payment by a tenant of rent which has actually become due to a mortgagor before any claim by a mortgagee is valid, whether the mortgage be legal or equitable. A prepayment is not really a payment of rent, as was pointed out by Willes J. in *De Nicholls v. Saunders*. (1) He said (3): "Payment of rent before it is due is not a fulfilment of the obligation imposed by the covenant to pay rent, but is, in fact, an advance to the landlord, with an agreement that on the day when the rent becomes due such advance shall be treated as a fulfilment of the obligation to pay the rent." But in that case, as in the present, when the day for payment arrived, the landlord was not

(1) L. R. 5 C. P. 589.

(2) 1 Dr. & Sm. 177.

(3) L. R. 5 C. P. 594.

in a position to give a discharge for the rent. Here the receiver claimed it before the due date. A prepayment will be good, to the amount of the rent which becomes actually due, before notice has been given to the tenant by the mortgagee, although not as to the residue: *Cook v. Guerra*. (1) *Green v. Rheinberg* (2) a was clear case, as there the landlord had, prior to the mortgage, released the rent to the lessee and tenant in possession, and under the doctrine of *Daniels v. Davison* (3) the subsequent mortgagee was affected with notice of the interest which the tenant had in the land. If the arrangement between mortgagor and tenant for prepayment of rent, or for setting off future rent against money due from the tenant to the mortgagor, be made subsequent to the date of the mortgage, such arrangement will be treated as a collateral bargain between those parties and not binding upon the mortgagee.

In my opinion, the appeal should be allowed, and an order now made for payment of the Michaelmas rent to the plaintiff's receiver.

Solicitors: *H. S. Knight Gregson ; McLeod, Eyre, Dowling & Co., for Hayward & Son, Stowmarket.*

(1) L. R. 7 C. P. 132, 136.

(2) 104 L. T. 149.

(3) (1809) 16 Ves. 249.

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[1913 G. 1401.]

Restraint of Trade—Covenant—Reasonable Protection of Covenantant—Severability of Covenant.

The plaintiff and the defendant each carried on a similar business as a dealer in imitation jewellery, one in Old Bond Street, and the other in New Bond Street, London. The business consisted of the sale of imitation pearls or other jewels which were mounted in gold or platinum and sometimes set in small real diamonds. In order to avoid competition the defendant sold his business to the plaintiff and covenanted that he would not for the period of two years "either solely or jointly with or as agent or employee for any other person or persons or company directly or indirectly carry on or be engaged concerned or interested in or render services (gratuitously or otherwise) to the business of a vendor or dealer in real or imitation jewellery in the county of London or any part of the United Kingdom of Great Britain and Ireland and the Isle of Man or in France, the United States, Russia, or Spain, or within twenty-five miles of Potsdamerstrasse, Berlin, or St. Stefans Kirche, Vienna."

The defendant having committed breaches of the covenant, in an action for an injunction:—

Held by the Court of Appeal, (1.), affirming the decision of Neville J. [1914] 2 Ch. 603, that the covenant was too wide in area unless severable; but that the covenant not to carry on business in the United Kingdom or the Isle of Man was severable from the rest, and was not wider than was reasonably necessary for the plaintiff's protection. (2.) Modifying the order of Neville J., that in so far as the covenant prevented the defendant from dealing in real or imitation jewellery it was unreasonably wide, but that in this respect also it was severable, and the defendant must be restrained from dealing in imitation jewellery.

APPEAL from a decision of Neville J. (1)

In June, 1912, the plaintiff Goldsoll was carrying on the business of a dealer in imitation pearls known as Tecla pearls, and other real and imitation jewellery, at 7, Old Bond Street, London, under the style of Tecla, and a company called Terisa, Limited, was carrying on the business of dealers in imitation pearls known as Terisa pearls, and other real and imitation jewellery, at 8, New Bond Street. The defendant Goldman held substantially all the shares in and the whole of the debentures issued by Terisa, Limited. This company was in liquidation, and a

(1) [1914] 2 Ch. 603.

receiver of its undertaking had been appointed on behalf of the defendant Goldman in his capacity of debenture-holder. By an agreement under seal dated June 25, 1912, and made between the plaintiff Goldsoll and the defendant Goldman, after reciting that the agreement was entered into with a view to merging the interests of the plaintiff Goldsoll and the defendant Goldman, and avoiding mutual competition in the sale of real and imitation jewellery in the United Kingdom and elsewhere, it was agreed that Goldsoll should form a company to which he would transfer his business carried on at 7, Old Bond Street under the name of Tecla, in which the defendant Goldman should take an interest, and the defendant Goldman for that and other valuable considerations entered into the agreement following:—Clause 3.

“The said Joseph Goldman hereby covenants and agrees with the said Frank Joseph Goldsoll and shall also forthwith upon formation separately covenant and agree with Tecla, Limited, and any other company formed in accordance with the provisions of these presents, that he will not prior to the 31st day of October, 1912, (save so far as it may be necessary for him so to do to realise his interest in Terisa, Limited) and for a period of ten years from the 31st day of October, 1912, (save so far as the said Joseph Goldman may in accordance with the provisions hereof be interested in the London Tecla business) either solely or jointly with or as agent or employee for any person or persons or company directly or indirectly carry on or be engaged or concerned or interested in or render services (gratuitously or otherwise) to the business of a vendor of or dealer in real or imitation jewellery in the county of London, England, Scotland, Ireland, Wales, or any part of the United Kingdom of Great Britain and Ireland and the Isle of Man or in France, the United States of America, Russia, or Spain, or within twenty-five miles of Potsdamerstrasse, Berlin, or St. Stefans Kirche, Vienna.”

The defendant Goldman also agreed that he would make himself absolute owner of the Terisa business and cause the assets thereof to be realized in the usual course of business without advertising or holding any sale at reduced prices, and cause the business to be discontinued, and prevent the trade mark or name Terisa being used in connection with the sale of or dealing in

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real or imitation jewellery. The agreement also contained clauses fixing money penalties for breaches of each clause.

By a further agreement dated November 2, 1912, and made between the same parties, it was provided that the restrictions contained in clause 3 of the first agreement should cease at the expiration of two years from July 7, 1913. In pursuance of the said agreement a company called the London Tecla Gem Company, Limited, was formed and acquired the business carried on by the plaintiff Goldsoll, and by an indenture dated December 30, 1912, the benefit of the said agreements with Goldman was assigned to the London Tecla Gem Company.

This action was brought by Goldsoll and the London Tecla Gem Company against Goldman, S. Sessel & Co., and J. H. Sessel, alleging that the defendant Goldman had committed breaches of the covenant on his part contained in the first agreement, and that the defendants J. H. Sessel and S. Sessel & Co. had knowingly incited, procured, and induced such breaches, and aided and abetted the violation of the said agreement.

J. H. Sessel was the managing director of Terisa, Limited, until the winding-up, and he and his wife had since September, 1912, been carrying on at 14, New Bond Street the business of selling imitation pearls in the name of S. Sessel & Co. The lease of 14, New Bond Street had been taken in the name of Mrs. Sessel, but it was alleged to have been applied for by Goldman. It was further alleged that the business was really Goldman's, and that he had, in breach of the agreement, handed over a great part of the stock in trade of Terisa, Limited, to the Sessels without payment, and that letters and customers coming to the old address at 8, New Bond Street were sent on to No. 14 and there supplied with imitation pearls under the name "Terisa," and that Goldman had given the Sessels a register of names of the customers of Terisa, Limited, and certain cards or files containing other such names. It was also alleged that Goldman was interested in the businesses of a dealer in real or imitation jewellery carried on at 5, George Street, Hanover Square, under the name Palmeira Pearl Company, and other like businesses carried on in the neighbourhood under the names of Topaz and Warwick respectively.

The plaintiffs claimed (1.) an injunction restraining Goldman from breaches of his covenant at 14, New Bond Street or 5, George Street, Hanover Square, or elsewhere in the county of London or France; (2.) an injunction restraining the other defendants from procuring, inciting, or inducing the defendant Goldman to violate his covenants; (3.) an injunction against all the defendants restraining them from using the name "Terisa" in connection with dealing in real or imitation jewellery; (4.) payment by Goldman of the penal sums fixed by the agreement; (5.) damages against the other defendants. The defences were that no breach had been committed; that the covenant was too wide because it included real jewellery; that it was too wide in area and not severable; that inciting a covenantor to break his covenant was not actionable unless damages were proved; that there was no proof of damage; that the remedy for such inciting was not an injunction, but damages.

Neville J. held on the evidence that Goldman had broken his covenant, and that the other defendants had induced him to do so. He held, further, (1.) that the covenant was not too wide because it extended to real jewellery, though the plaintiffs' business was chiefly if not entirely confined to imitation jewellery; (2.) that the covenant was too wide in area, but that that part of it which prohibited carrying on business in the United Kingdom or the Isle of Man was severable from the rest, and was not too wide; (3.) that damages are essential to the right of action which a covenantee has against one who induces his covenantor to break his contract, but that there was here sufficient evidence of damages; (4.) in a case where the breach which has been procured would in the ordinary course inflict damage on the plaintiff, the plaintiff may succeed without proof of particular damage.

The defendant Goldman appealed.

The only points dealt with on the appeal were (1.) whether the covenant contained in clause 3 of the agreement was too wide both as to area and the nature of the business; and (2.) whether it was severable in both respects.

Rigby Swift, K.C., and *Lincoln Reed*, for the appellant. The agreement is wider than is necessary for the protection of the

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plaintiffs' business and is therefore void. It is unreasonably wide (1.) as to the nature of the business which Goldman is prohibited from participating in ; and (2.) as to the area of prohibition. Neville J. severed the covenant as to area and upheld it as to part and rejected the rest. We submit he was wrong in doing that. There can only be severance where there are substantially two separate covenants: *Price v. Green*. (1)

[LORD COZENS-HARDY M.R. We are bound by decisions of this Court to hold that the doctrine of severability applies to these covenants.]

We rely upon the observations of Lord Moulton in *Mason v. Provident Clothing and Supply Co.* (2)

[LORD COZENS-HARDY M.R. referred to *Eastes v. Russ*. (3)]

The covenant is too wide as regards the nature of the business.

[LORD COZENS-HARDY M.R. The doctrine of severability is applicable to the business as well as to the area.]

Jenkins, K.C., and *W. E. Vernon*, for the respondents. The Court will not be astute to find that the covenant is wider than is reasonably necessary for the protection of the covenantees: *Haynes v. Doman*. (4)

As to the nature of the business, the parties were contemplating the business of dealing in real and imitation jewellery. If the word "or" is to be read strictly, then the covenant is severable, and so far as it restricts the carrying on business in imitation jewellery it will be enforced. The plaintiffs will be content if their business in imitation jewellery is protected.

[They were stopped by the Court.]

LORD COZENS-HARDY M.R. This is an appeal from Neville J., and the question is whether a covenant entered into between Goldsoll and Goldman is unreasonable as it stands, and, if it is, whether it is severable, so that it may be good in part and bad in part. The plaintiffs are carrying on the business of dealers in imitation jewellery. They do not carry on business in real jewellery, and I say this although some of the articles they deal

(1) (1845) 13 M. & W. 695 ; (1847) 16 M. & W. 346. (2) [1913] A. C. 724, 745.

(3) [1914] 1 Ch. 468.

(4) [1899] 2 Ch. 13.

in are made of real gold in which Tecla pearls are set and occasionally the pearls are set in small diamonds. Substantially the business is in imitation jewellery. In 1912 Goldman was carrying on a business in competition with Goldsoll, and the agreement in question was entered into with the object of putting an end to the competition. There was ample consideration for the agreement, and by the clause of the deed which we have to consider Goldman covenanted with Goldsoll that he would not for a period of ten years (which was reduced by a subsequent agreement to two years) "either solely or jointly with or as agent or employee for any person or company directly or indirectly carry on or be interested in the business of a vendor of or dealer in real or imitation jewellery in the county of London, England, Scotland, Ireland, Wales, or any part of the United Kingdom of Great Britain and Ireland and the Isle of Man or in France, the United States of America, Russia, or Spain, or within twenty-five miles of Potsdamerstrasse, Berlin, or St. Stefans Kirche, Vienna." Notwithstanding this covenant Goldman has, according to the finding of the learned judge, been assisting and rendering services to a confederate who is carrying on a business identical to that of the plaintiffs in the same street. It is perfectly clear that there has been a breach of the covenant; but that is not conclusive of the case, for what we have to consider is whether the covenant he has broken can be treated as good either in whole or in part, and can be enforced. On the question of the space covered by the covenant Neville J. has held, and I entirely agree with him, that it is unnecessarily large in so far as it is intended to cover not merely the United Kingdom and the Isle of Man but also the foreign countries mentioned in the covenant. He has also held, and his decision is consistent with a long series of authorities, that the covenant can be severed as regards the space covered by it. It is clear that part of the covenant dealing with the area is reasonable, and the learned judge has limited the injunction he has granted to "the county of London, England, Scotland, Ireland, Wales, or any part of the United Kingdom of Great Britain and Ireland and the Isle of Man." That such a covenant is severable in this respect has been decided by authorities nearly 200 years old. No objection

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is taken or could be taken with regard to the limit of time, but the further difficulty has been raised that, while the business of the plaintiffs was, as I said, a business in imitation jewellery, the covenant is against carrying on or being interested in "the business of a vendor of or dealer in real or imitation jewellery." It is admitted that the business of a dealer in real jewellery is not the same as that of a dealer in imitation jewellery. There are many shopkeepers who would be insulted if they were asked whether they sold imitation jewellery. That being so, it is difficult to support the whole of this provision, for the covenant must be limited to what is reasonably necessary for the protection of the covenantee's business. Then comes the question whether the doctrine of severability is applicable to this part of the covenant. In my opinion it is, and the covenant is good in so far as it operates to restrain the covenantor from carrying on business in imitation jewellery.

The result is, in my opinion, that the order of Neville J. is right with the exception that the words "real or" ought to be omitted from the injunction granted by him. The appeal fails on the matter as to which alone the plaintiffs complained and must be dismissed with costs.

KENNEDY L.J. I entirely agree. The facts are not in dispute between the parties so far as they affect the particular question we have to consider, namely, the propriety of the injunction granted by Neville J. It was not disputed that there was evidence to justify Neville J. in holding that the appellant is a person who has, in breach of his covenant, been assisting or working for another who is a vendor of or dealer in imitation jewellery; and in so far therefore as imitation jewellery is concerned it is clear that the injunction granted would be right, subject only to the question raised as to the unreasonableness of the covenant as being too large a restraint on trade.

As the Master of the Rolls has pointed out, it is of no use now to consider whether, when a person chooses to take from another a covenant in restraint of trade larger than is necessary for the protection of his business, the contract may not be enforced against the covenantor in respect of the part of the restraint

not required for the protection of the covenantee. The doctrine of severability has been admitted by the Courts, and while I am far from saying that I do not see the force of the great objections brought forward by Lord Moulton in *Mason v. Provident Clothing and Supply Co.* (1) and by Neville J. in this case, it is of no use going into that, because it has been held in decisions binding on this Court that, if words are used in a covenant such as admit of severability by mentioning different areas, we must sever the covenant so as to limit its operation to an area which is not too large. Moreover, if ever there was a case of severability we have it here, for countries are specified which may be treated as representing the United Kingdom as distinguished from foreign countries. There is therefore no sound objection to holding, as Neville J. has, that severed in that way there is a reasonable part of the covenant which ought to be enforced in favour of the plaintiffs.

It remains to deal with the nature of the business in respect of which the restrictive covenant has been taken. It relates to "the business of a vendor of or dealer in real or imitation jewellery." It is not really disputed that the essential or sole business which the contract was intended to protect was that of a dealer in imitation jewellery in the sense that the articles sold were never real in their entire composition, and that the central portions by which they would naturally be described, as for instance a ruby ring, or a pearl necklace, were not real. It is against dealing in goods of that kind that the plaintiffs ought to be protected, and as we can here, by reason of the language, sever "vendor of or dealer in real or imitation jewellery" we ought to do so, and limit the injunction to dealing in imitation jewellery by striking out the words "real or." This limitation of the injunction would not, however, protect the defendant if he were to go into a business part imitation and part real—he would still come within the terms of the injunction. I agree therefore that the order of Neville J. should be modified as the Master of the Rolls has already said, and I agree that this modification should not affect the way in which the costs of the appeal are to be borne.

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(1) [1913] A. C. 724, 745.

C. A. The defendant Goldman has been doing the very thing which
1914 would be a breach of the covenant if the words "real or" had
GOLDSOLL been omitted. He has no merits, and we are able to do that
v. which prevents even the suggestion of any unreasonable
GOLDMAN. restriction.

SWINFEN EADY L.J. This appeal as opened is an appeal by Goldman against so much of the judgment as awarded against him an injunction from being during a limited time and within a limited area engaged in the business there described. The appeal raises two points. It is said that the covenant is invalid owing to the area to which it applies being too wide, and the nature of the business to which it relates also being too wide. This is not a case between master and servant, but between vendor and purchaser. The plaintiffs purchased the defendant's business in order to prevent competition by the defendant. The covenant provided that the covenantor was not to carry on business in the county of London, England, Scotland, Ireland, Wales, or any part of the United Kingdom of Great Britain and Ireland and the Isle of Man, or in France, the United States of America, Russia, or Spain, or within twenty-five miles of Potsdamerstrasse, Berlin, or St. Stefans Kirche, Vienna. Neville J. has held it to be valid as regards the United Kingdom and the Isle of Man, and the appellant contends that this is wrong.

In my judgment the covenant is clearly severable as regards area and the provision against trading in the United Kingdom and the Isle of Man is not wider than is reasonable for the protection of the covenantee. The business is carried on mainly by advertisements in illustrated papers in the United Kingdom, and business is obtained from Scotland and other places as well as from England itself. As much as 6000*l.* is spent on advertising. I am of opinion that the restriction to the United Kingdom and the Isle of Man is not excessive as regards area, and that as the covenant is severable it is valid to that extent.

There is a further point, however, with regard to the matter of the business. The agreement in question recites that both the parties to it were carrying on business in real and imitation jewellery, and the business has been described as one in which

the imitation pearls used may be set in small real diamonds and are usually set in gold or platinum. That is what the parties meant by the business in real and imitation jewellery. But in the operative part of the deed the covenant is not expressed in the same language. It is a covenant not to "carry on or be interested in the business of a vendor of or dealer in real or imitation jewellery," and it is argued that this might extend to prevent dealing in real jewellery alone. When this was pointed out, the respondents at once expressed their willingness to have the injunction modified so as to apply only to dealing in imitation jewellery. The words "real or" will therefore be struck out of the injunction granted by Neville J. The injunction so limited will extend to a dealing in imitation jewellery in the sense in which the words have been used in Court and will include a dealing in jewellery which is partly real and partly imitation. Subject to this variation in the order, I think the appeal fails and must be dismissed.

Solicitors: *W. B. Glasier ; J. R. Cardew Smith.*

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Dec. 9.*In re* FISHER.ROBINSON *v.* EARDLEY.

[1914 F. 1173.]

Will—Construction—Bequest for Life—Remainder to Two Persons—Should one die before the other, Survivor to take the Whole—Reading in Contingency.

A testator left property in trust for A. for life, and at her death to go to his two nieces B. and C. in equal shares. "Should one of my nieces die before the other, the other surviving niece to take the whole. Should my nieces die without lawful issue," the estate to be sold and divided amongst other persons. Testator died in 1857, the tenant for life in 1873, and B. (leaving children) in 1911:—

Held, that there must be read into the gift the contingency of a niece dying in the lifetime of the tenant for life, and that C. was only entitled to one half and the executors of B. to the other.

Howard v. Howard (1856) 21 Beav. 550 followed.

JAMES FISHER by his will, dated December 29, 1856, after giving certain pecuniary legacies, gave and devised a dwelling-house called Roach House to his sister Ellen Goodfellow "to hold the same for her natural life, and at her decease the aforesaid estate to go to her two daughters Elizabeth Goodfellow and Ellen Goodfellow, my nieces, share and share alike. Should one of my nieces die before the other, that is to say Elizabeth Goodfellow or Ellen Goodfellow, the other surviving niece to take the whole estate. Should my nieces Elizabeth Goodfellow and Ellen Goodfellow die without lawful issue, then the Roach House estate to be sold and divided among" certain named nephews and nieces.

The testator died on April 28, 1857.

Ellen Goodfellow, his sister, died on August 17, 1873.

Elizabeth Goodfellow married one Robinson, and died on March 20, 1911, leaving five children, and by her will she appointed one of them, Joseph Robinson, and another person her executors.

Ellen Goodfellow, the niece, married one Eardley, by whom she had several children.

The executors of Mrs. Robinson took out an originating

summons against Mrs. Eardley for the determination of the questions (1.) whether Roach House was now vested absolutely, as to one undivided moiety, in the plaintiffs as the legal personal representatives of Mrs. Robinson, and, as to the other undivided moiety, in Mrs. Eardley; and (2.) who was now entitled to Roach House, and in what shares and for what estates or interests.

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T. T. Methold, for the plaintiffs. Mrs. Robinson on her mother's death took one half of the property. Although the testator says that should one of his nieces die before the other the other is to take, as the death of one before the other is a certainty, he must have meant if one dies before the other by some particular time, and that must mean the time of the death of her mother, the tenant for life. The case is governed by *Howard v. Howard*. (1) There there was no prior gift for life, but the bequest was to four persons equally, and "in case of the death" of any or either of them "in the lifetime of the other or others," their shares were to go to "the survivors or survivor of them," and it was held that, as it was certain that some must die before the others or other, some contingency must be supplied, and that must be the time of the testator's death.

[SARGANT J. referred to *O'Mahoney v. Burdett*. (2)]

That was the case in which the House of Lords overruled the fourth rule of construction laid down in *Edwards v. Edwards* (3), namely, that where there is a gift by will to X. for life, with remainder to A., and if he shall die without leaving children to B., the contingency has reference to the death of the tenant for life. In *Barker v. Cocks* (4), where testator gave a fund, subject to the life interest of his wife, to three persons equally, but in case of the decease of one of them, Eliza Jane Cocks, "without leaving lawful issue," he gave her one third share to the other two, it was held that, on the decease of the wife, Eliza Jane, then living, became absolutely entitled to one third of the fund. [He also referred to *Wing v. Angrave*. (5)]

A. Adams, for the defendant Mrs. Eardley. Mrs. Eardley is

(1) 21 Beav. 550.

(3) (1852) 15 Beav. 357.

(2) (1874) L. R. 7 H. L. 388.

(4) (1843) 6 Beav. 82.

(5) (1860) 8 H. L. C. 183.

SARGANT J. entitled to the whole of the house. There is not necessarily a contingency which has to be supplied in this case. The deaths of two persons eo instanti are not an impossibility. They might be killed by one shell. *O'Mahoney v. Burdett* (1) is in my favour. The gift over to the surviving niece takes effect whether the death of the other one takes place before or after the death of the tenant for life. In the cases in which the Courts have read into wills the words "in my lifetime" or "in the lifetime of the tenant for life" there has been no difficulty in doing so. But here there is already one contingency, namely, that one niece shall survive the other, and the Court is asked to substitute for that a double contingency, namely, death before the other niece and in the lifetime of the tenant for life. In Jarman on Wills, 6th ed. p. 2146, after referring to *Howard v. Howard* (2), the learned author says: "There are, however, a few cases of immediate bequests in which the words under consideration have been construed to refer to death at any time, and not to the contingent event of death in the lifetime of the testator; but" he adds "in each there seems to have been some circumstance evincing an intention to use the words in that rather than in the ordinary sense."

SARGANT J. The question before me is whether, in the events which have happened, certain property is absolutely and entirely vested in one person, namely, the defendant Mrs. Eardley, or whether she is only entitled to one half, and the other belongs to the plaintiffs as the executors of Mrs. Robinson. This question arises on the construction of a short clause in the will of one James Fisher, who died in 1857. By his will he gave a house called "Roach House" to his sister for life, and after her death it was to go to "her two daughters Elizabeth Goodfellow and Ellen Goodfellow, my nieces, share and share alike." Then the will goes on "Should one of my nieces die before the other, that is to say Elizabeth Goodfellow or Ellen Goodfellow, the other surviving niece to take the whole. Should my nieces Elizabeth Goodfellow and Ellen Goodfellow die without lawful issue, then the Roach House estate to be sold and divided among" certain nephews and nieces.

(1) L. R. 7 H. L. 388.

(2) 21 Beav. 550.

What happened was as follows. The testator's sister, the tenant for life, died in 1873, leaving both her daughters surviving. One of them, Elizabeth, became Mrs. Robinson, and died in 1911, leaving five children, and having by her will appointed the plaintiffs her executors. Ellen, the other daughter, became Mrs. Eardley, and she is still living and has several children. I am asked by the plaintiffs' counsel to apply to this case the principle applied in *Howard v. Howard*. (1) It is well established that when a testator says that property is to go in a certain way "if" some one "shall die," then, inasmuch as death at one time or another is a certainty for every one, you must, to render the hypothetical words sensible, construe the clause as referring to death within some particular period. The reference to death in the will in *Howard v. Howard* (1) was "in case of the death of" certain persons, "or any or either of them, in the lifetime of the other or others of them." And there Sir John Romilly M.R. thought that the same principle applied. "Wherever" he says "a testator speaks of death hypothetically, there, death, being the most certain of all things, can only be made hypothetical by referring it to some particular period." Then he says: "Suppose you read this gift, leaving out the clause 'in the lifetime of the other or others of them,' in that case there could be no question as to the proper construction. The event referred to must have been the death of the testator, because he speaks hypothetically of an event which must certainly happen, viz., death. But read it with these words—'in the lifetime of the other or others of them.' Does it produce any effect? Does it"—the next word, "not," is a mistake in the report—"make the event of death more hypothetical or contingent than before? If you speak of the death of one of two persons in the life of the other, it is a certainty, for one must die in the life of the other."

If that conclusion is right—and I think it is perfectly right—you are putting the case in exactly the same position as where the testator says "if X. shall die." You must in either case supply an unexpressed contingency. The death of one of two persons in the lifetime of the other is a certainty, not only in common parlance, but, I think, speaking scientifically, for, having

(1) 21 Beav. 550, 551.

SARGANT J. regard to the infinite divisibility of time, it seems to me impossible that both should die at exactly the same moment. *Howard v. Howard* (1) is, in my judgment, both good law and good sense, and I have no hesitation in following it, with this slight variation, namely, that as there is a life tenancy here the period impliedly referred to is a period extending to the death of the tenant for life.

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The very strange result would follow, if I acceded to Mr. Adams's argument, that if his client had not had any children, but had died without children, she would have been saved by her sister predeceasing her leaving lawful issue.

I hold, therefore, that Mrs. Eardley takes only one half share, and that the executors of Mrs. Robinson are entitled to the other half.

Solicitor for plaintiffs: *William Lea, for Challinors & Shaw, Leek.*

Solicitor for defendant: *L. W. Byrne, for Blunt & Brocklehurst, Macclesfield.*

(1) 21 Beav. 550.

F. E.

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JENNINGS v. NYE.

ASTBURY J.

1914

Nov. 26.

[1914 C. 2082.]

Trustee—Power of appointing New Trustee—Exercise of Power—Fiduciary Power—Appointment of Solicitor of Donee of Power—Appointment after Court has made an Order relating to the Trust under Order LV.

Though the Court will not itself appoint a solicitor of one of the parties to be a new trustee, an appointment of his own solicitor by the donee of a power to appoint is not invalid, even when the appointment is made without notice to the cestuis que trust, and the trustee appointed is objectionable to some of them. The rule that the donee of a power to appoint new trustees cannot exercise it after the Court has made an order for administration without the approval of the Court applies only when there is a general administration order. It does not apply to an order for partial administration under Order LV., unless an inquiry is ordered as to the appointment of new trustees, or the proceedings are taken for the purpose of having new trustees appointed.

In re Earl of Stamford [1896] 1 Ch. 288 followed.

In re Hall (1885) 33 W. R. 508 and *Attorney-General v. Clack* (1839) 1 Beav. 467 distinguished.

HUGH COTTER, deceased (hereinafter called the testator), by his will, dated December 2, 1902, after a specific bequest of furniture to his two daughters, Harriet Mary Nye and the plaintiff, Ann Hannah Jennings, in equal shares, devised and bequeathed to trustees, therein named, all his freehold and leasehold messuages upon trust in the events which happened to receive the rents and profits and pay the outgoings relating thereto, and to pay the net rents and profits to his said two daughters in equal shares during their lives, and after the death of one of them to the survivor during her life, and subject thereto he devised and bequeathed all his freehold and leasehold estates to his trustees upon trust for all or any the children or child of his said daughters living at his decease or born in due time afterwards and who being a son or sons should attain the age of twenty-one years or being a daughter or daughters should attain that age or marry, and if more than one in equal shares. And the testator gave to his trustees all his personal estate upon trust

ASTBURY J. for sale and after payment of his funeral and testamentary expenses and debts upon trust for the children of his daughters who should attain twenty-one or marry. And he gave his trustees power at their discretion to apply the whole or any part of the income towards the maintenance, education, and benefit of any minor contingently entitled to such income. The will contained no power of appointing new trustees.

By a codicil, dated January 16, 1904, the testator revoked the appointment of trustees contained in his will and appointed S. H. Nye, the husband of his daughter, Mrs. Nye, H. W. Massey, and J. H. Pringle trustees and executors of his will.

The testator died on March 5, 1907, and his will was duly proved by the executors named in the codicil.

Henry William Massey retired from the trusteeship on December 29, 1908, and from that date the trusts of the will were carried out by Nye and Pringle. They employed Messrs. Baddeleys & Co. as their solicitors and generally acted on their advice in the matters of the trust.

The testator's other daughter, Mrs. Jennings, was a widow at the testator's death and had two infant sons. Mrs. Nye had four children who were also infants. The trustees allowed Mrs. Jennings part of the income to which her children were contingently entitled for their maintenance, but differences had arisen from time to time between her and the trustees about the amount, and in 1913 a long and rather acrimonious correspondence took place between Mrs. Jennings' solicitors and Messrs. Baddeleys & Co. on the subject of the maintenance and also about the way in which the trustees were dealing with the accumulations of income. In December, 1913, Mrs. Jennings took out a summons on behalf of herself and her infant children against the trustees for an account of such accumulated income, to have proper provision made for the maintenance and education of the infant plaintiffs, and so far as was necessary for the administration of the personal estate of the testator. On April 24, 1914, Astbury J. made an order on this summons that a scheme for the maintenance and education of the infants should be brought in and settled by the Court. The scheme was said to be in preparation, but nothing had been actually done

before June 7, 1914, on which day J. H. Pringle died. There-
upon, without even communicating the fact of his death to
Mrs. Jennings or her solicitors, Nye, in exercise of his statutory
power as surviving trustee, appointed C. L. Baddeley, a member
of the firm of Baddeleys & Co., a trustee in the place of
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Neither Mrs. Jennings nor her solicitors were told of this
appointment until June 17, when her solicitors wrote to
Messrs. Baddeleys & Co. on the subject of the scheme, and
were informed in reply that Pringle was dead and Nye had
appointed C. L. Baddeley trustee in his place. Mrs. Jennings
immediately objected, and on July 4, 1914, commenced this
action, in which she and her infant children were plaintiffs and
Nye and C. L. Baddeley were defendants, asking for a declaration
that the appointment of C. L. Baddeley was invalid; and in the
alternative for his removal.

Micklem, K.C., and *J. H. Boome*, for the plaintiffs. The
plaintiffs are not making any personal charge against Mr. C. L.
Baddeley, but his appointment is most improper and cannot be
allowed to stand. The interests of the two families are opposed
and have led to hostile litigation. Nye, as surviving trustee, has
appointed a member of the firm of solicitors who have all along
been advising him and his co-trustee in that litigation, and in a
course of conduct in administering the trust which was favourable
to his own children's interests, and unfavourable to those of
Mrs. Jennings' children.

A power of appointing new trustees is fiduciary, and must be
exercised for the benefit of all the beneficiaries: *In re Skeats'*
Settlement. (1) A person in Baddeley's position cannot possibly
be a fair and impartial trustee, and the case is within the reason-
ing of the judgment of Kay J. in that case. Even if the fact
that the new trustee was the solicitor of the donee of the power
is not enough to make the appointment bad, he has been advising
the old trustees in litigation which was hostile to a large part of
the beneficiaries and is objectionable to them.

(1) (1889) 42 Ch. D. 522.

ASTBURY J. The appointment is also bad because after the order made in chambers, though the power of appointment does not cease to exist, it cannot be exercised without the approval of the Court. This rule is unquestioned when there is a full administration order: *In re Gadd* (1); *In re Norris* (2); and we contend that it also applies where there is an order for partial administration under Order LV.: *In re Hall* (3); *Attorney-General v. Clack*. (4) Rules of the Supreme Court, Order LV., r. 12, provides that "The issue of a summons under rule 3 of this Order shall not interfere with or control any power or discretion vested in any executor, administrator, or trustee, except so far as such interference or control may necessarily be involved in the particular relief sought." Here the summons relates chiefly to maintenance, and it is the bias of the new trustee as to that question which makes his appointment objectionable, as the power is necessarily interfered with. We do not say the power does not exist, but only that the donee cannot be allowed to exercise it without the approval of the Court. *In re Earl of Stamford* (5) is another authority to the same effect.

Even if the appointment is good the Court has power to remove Mr. Baddeley from the trust, and the only guide for the Court in exercising that jurisdiction is the welfare of the beneficiaries: *Letterstedt v. Broers*. (6)

After an order for determination of questions under Order LV., the parties are treated as standing in the same position as if under the old practice an administration order had been made: *In re Wenham*. (7) That was a question of the beneficiaries' right to have the Statute of Limitations pleaded, but the rule laid down is general.

Hon. Frank Russell, K.C., and *P. F. Wheeler*, for the defendants. The plaintiffs' claim is put upon two grounds, (1.) that the appointment is bad; (2.) that if it is valid the new trustee ought to be removed.

The second ground at any rate is misconceived, for the Court

(1) (1883) 23 Ch. D. 134.

(2) (1884) 27 Ch. D. 333.

(3) 33 W. R. 508; 54 L. J. (Ch.)

527.

(4) 1 Beav. 467.

(5) [1896] 1 Ch. 288.

(6) (1884) 9 App. Cas. 371, 387.

(7) [1892] 3 Ch. 59.

will never remove a trustee except in the presence of all the ASTBURY J.
beneficiaries.

[They were stopped by the Court.]

ASTBURY J. This is an action in the matter of one Hugh Cotter, deceased, brought by one of his daughters, Mrs. Jennings, and her two children against the present trustees of the estate. Under the testator's will the freehold and leasehold estates were given to his trustees upon trust for his two daughters for their lives and the life of the survivor and subject thereto his real and residuary personal estates were given in trust for the children of his two daughters who attained twenty-one or married under that age in equal shares. The other daughter of the testator is the wife of the defendant Nye and there are four children of that marriage. The testator appointed the defendant Nye, Henry William Massey, who resigned in 1908, and John Harris Pringle trustees and executors of his will. The defendant Nye and Pringle, after the resignation of Mr. Massey, acted in the trusts of the will until the death of Pringle on June 7 last. For some time differences arose between the plaintiff and the then trustees, Nye and Pringle, as to the amount of the maintenance money which ought to be allowed under the trusts of the will for the maintenance and education of her two children. Considerable correspondence took place in which the lady took one view and the trustees took another. I have no reason to suppose that the trustees did otherwise than form an honest and bona fide opinion as to what amount of maintenance should be allowed. Mrs. Jennings not being satisfied, an administration summons was issued in December last by her two children, she acting as their next friend, and on April 24 last I made an order directing that a scheme for the maintenance and education of the infant children, having regard to the income of their mother, should be settled by the judge. In June Mrs. Jennings' solicitors made a suggestion as to what should be done under that scheme, and on June 17 they received a letter from Mr. Nye's solicitors, Messrs. Baddeleys & Co., informing them that Mr. Pringle had died on the 7th inst. and that under those circumstances the surviving trustee had appointed the defendant

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ASTBURY J. Baddeley, who was a member of the firm who had been acting for him and his co-trustee, trustee in place of Mr. Pringle, and then the letter proceeds: "The present trustees"—that is, the present defendants—"have considered your letter of the 12th inst. but they are of opinion that the Court should be left to decide what the future allowance for maintenance should be." Correspondence followed between the parties, and on July 4 the writ in this action was issued, in which a declaration is asked that the appointment of the defendant Baddeley in the place of John Harris Pringle was an improper exercise of the power of appointing a new trustee which was vested in the defendant Nye, and alternatively for an order for his removal.

Now the plaintiff alleged, and it is the fact, that no communication of the death of Mr. Pringle was made to her, or of any intention to appoint the defendant Baddeley, until the letter of June 17 to which I have referred. It is alleged that Mr. Baddeley, being a member of the firm of solicitors acting for Mr. Nye, who had these differences with the plaintiff in respect of her children's maintenance, is an improper person under the circumstances to have been appointed a trustee. No personal charge of any sort is made against Mr. Baddeley, but it is said, that being a member of the firm of solicitors who were acting for the defendant Nye and his co-trustee, Pringle, who had taken up a hostile attitude towards the plaintiff, he is an improper person to have been appointed, and that the exercise of this power, which is a fiduciary one on the part of Mr. Nye, in his favour ought to be declared to be bad.

It is quite clear that the donee of a power cannot appoint himself, and it is argued on behalf of the plaintiff that the appointment of the solicitor in the present circumstances is vitiated for the same reasons as the appointment by the donee of himself was vitiated in the case of *In re Skeats' Settlement*.⁽¹⁾ I do not think the decision in that case really assists me at all. The appointment of another person and an appointment by a donee of himself are subject to totally different considerations, and, so far as the contention goes that the appointment is ipso facto bad because the surviving trustee

(1) 42 Ch. D. 522.

has appointed one of the members of his own solicitors' firm ASTBURY J. trustee, the action must, in my judgment, fail.

The second point taken on behalf of the plaintiffs is that by the order of this Court of April 24 last Mrs. Jennings' children became wards of Court, and that although no general administration order was made on that occasion there was a scheme directed in the nature of partial administration in respect of the matter in which the parties had been in difference, and it has been contended that the rule which applies when a general administration order has been made ought to be applied here, namely, that no appointment made subsequent to such order ought to be or is effective until sanctioned by the Court. I have been referred to the case of *In re Hall*. (1) That was a case before Pearson J. in 1885 in which an administration action was brought, but on the motion for judgment certain inquiries only were directed, including an inquiry whether any and what persons had been appointed new trustees, and whether any and what proceedings should be taken. Subsequent to that order the defendant, in exercise of his statutory power, appointed a new trustee, and a motion was brought to restrain the completion of the appointment. Pearson J. said: "The Court, however, did not make a decree for general administration, but by virtue of Order L.V., r. 10, made an order directing certain inquiries only. That order does not interfere with the exercise by the trustees of their powers except so far as such exercise conflicts with the inquiries directed," and then he went on to deal with the particular case in which the inquiry directed was with regard to the very question of the appointment of trustees. In the case of *Attorney-General v. Clack* (2), where pending an information filed for the purpose of having new trustees of a charity appointed the surviving trustees, without the sanction of the Court, appointed new trustees, it was held that this "imposed upon the trustees the necessity of proving, by the strictest evidence, and at their own expense, that what had been done was perfectly right and proper." I do not think either of those cases is sufficient to enable me to set aside this appointment. The case of

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(1) 33 W. R. 508, 509.

(2) 1 Beav. 467.

ASTBURY J. *In re Hall* (1) shows, I think, that an order directing some specific inquiry, if it does not direct administration, is not such an order as would prevent the persons having the power of appointment of new trustees from exercising it in the ordinary way, unless the inquiries directed are such that the exercise of the power will interfere with their being carried out by the Court. *Attorney-General v. Clack* (2) was a case where the specific object of the proceedings was the appointment of certain trustees to a charity, and the Master of the Rolls held that pending those proceedings the donees of the power ought not to have exercised it. In the case of *In re Earl of Stamford* (3) the tenant for life, who was the donee of the power, appointed her own solicitor to be a new trustee. There Stirling J. said: "I think it is a matter of regret that the execution of the appointment, if it was to be made, was not postponed until some intimation of the views of the trustees had been obtained. However, the deed has been executed, and I have to decide whether the appointment is or is not valid." Then he says (4): "Now, none of the remaindermen have called upon the Countess, who is the donee of the power in the present case, to perform this duty; but I apprehend that it remains still a question for her to consider whether the circumstances of the case are such as to justify her in proceeding to an appointment of new trustees. If the appointment appeared to be without good ground or merely capricious, and not made bona fide, it is possible that the Court might see its way to interfere; but, upon the evidence before me, I do not see that any such case arises upon the present occasion. It is plain from what is stated in these affidavits that the discharge by Mr. Payne of his duties while he is resident abroad creates a certain amount of inconvenience and also of expense." Then he says (5): "And it is said that Sir Thomas Wright, the new trustee, who has to advise the Countess in the capacity of tenant for life, will be unable to discharge that duty efficiently when he comes to deal with the same matters as to which he has advised the Countess, in his capacity as trustee. I feel greatly

(1) 33 W. R. 508.

(3) [1896] 1 Ch. 288, 295.

(2) 1 Beav. 467.

(4) [1896] 1 Ch. 296.

(5) [1896] 1 Ch. 298.

the force of that objection." The learned judge held, as I think ASTBURY J. it obvious any judge would hold, that if it was an appointment to be made by the Court, or sanctioned by the Court, such appointment or sanction would not be made or given. Then the learned judge goes on (1): "But this is not a case in which the sanction of the Court is asked in any way, and, as is pointed out by Cotton L.J. himself in *In re Kemp's Settled Estates* (2), the question whether an appointment of this kind, when already made by the donee of the power, is or is not valid, is a very different one from the question whether the Court itself would see fit in the first instance either to make it or sanction it."

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After referring to the rule that the Court will not appoint the solicitor of a party, the learned judge says (3): "Does the existence of this rule of practice, however binding it may be, prevent the donee of a power from appointing her own solicitor to be a trustee? And in my judgment, although I should not have made the appointment or sanctioned it, it does not preclude the tenant for life from so doing. As far as the individual selected is concerned, there can be no question that he is a person who is excellently fitted to be trustee. He has had large experience, he is acquainted with the estates, and I have got this, which weighs very much with me, that although all the beneficiaries now in existence are before the Court, not one of them has said a word in opposition to the appointment."

That case really practically concludes this matter, except for one point of difference, namely, in this case some of the beneficiaries object to this appointment, whereas in the case before Stirling J. none of them did, but I do not think I can decide the case upon that ground. This appointment is either a good one or a bad one. If it is an appointment which I am not entitled under the rule which the Court acts upon in these cases to interfere with, then the mere fact that the plaintiff, unfortunately, disapproves of it is not sufficient to enable me to act.

The plaintiff, in her pleadings, then asks, if the appointment should not be declared invalid, that the new trustee should at all events be removed on the ground of his unfitness to be trustee

(1) [1896] 1 Ch. 299.

(2) (1883) 24 Ch. D. 485.

(3) [1896] 1 Ch. 300.

ASTBURY J. having regard to his previous association as solicitor with the trustee who appointed him. The decision in *Letterstedt v. Broers* (1), which was referred to on that point, does not, I think, really apply to the present case. If the objection to Mr. Baddeley's appointment is one which does not entitle me to say that the appointment cannot stand, I do not see how I can remove him on that ground alone.

This appointment is one which I think the surviving trustee, having regard to what had taken place between himself and the plaintiff in the past, ought not to have made. But that is a matter of opinion. It is not a matter of law, and having regard to the authorities by which I am bound, I do not think I have any power to upset the appointment, and the action must therefore be dismissed.

Having regard to the facts of the case and to the mode in which the appointment was made I dismiss the action without costs.

Solicitors: *R. & R. T. Jennings; Baddeleys & Co.*

(1) 9 App. Cas. 371.

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Dec. 3, 10.

Friendly Society—Registered Branch Lodge—Breach of Rules—Money wrongfully divided between Members by Trustees of Lodge—Right of Trustees of Society to recover—Jurisdiction of Court—Dispute between Society and Members—Reference to General Meeting—Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68.

The rules of the O. Friendly Society provided that if any dispute should arise between the society and the board of directors and any district, lodge, or member such dispute should be referred to the following general meeting for settlement, except where otherwise provided by the rules. The rules further provided that no lodge should divide its funds or any part thereof without the sanction of the board of directors and a certificate of dissolution, and that any lodge acting contrary to this rule should forfeit the money so divided to the general fund of the society, to be recovered by legal process.

Sect. 68 of the Friendly Societies Act, 1896, enacts that every dispute between an officer of any registered branch of any society and the society or branch of which that registered branch is a branch "shall be decided in manner directed by the rules of the society or branch."

The defendants, who were the trustees, secretary, and treasurer of a lodge registered as a branch of the O. Friendly Society, wrongfully divided the funds of the lodge between the members thereof in breach of the rules. The trustees of the society brought an action to recover the funds from the defendants:—

Held, that the defendants were liable to be sued as trustees in whom property was vested by statute to be held upon certain trusts, and that the right of action against them was not taken away by s. 68 of the Friendly Societies Act, 1896.

Semble, that, upon the construction of the rules also, the question in the action ought not to be referred to a general meeting of the society for settlement.

APPEAL from an order of the Vice-Chancellor of the Lancaster Palatine Court staying all proceedings in an action brought by the trustees of the Grand United Order of Oddfellows Friendly Society against the trustees, treasurer, and secretary of a lodge registered as a branch of the society under the Friendly Societies Act, 1896.

The Order, as stated in its registered rules (rule 2), was established with the object of raising a fund or funds for the payment of sickness and funeral benefits, the relief of members travelling in

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search of employment, during temporary or permanent disablement, and in old age, the relief of widows and orphans of members, and the establishment of accident, pension, and superannuation funds. The Order comprised various branches called districts and lodges, each district containing several lodges. The defendants' lodge was called the Lord Nelson Lodge, No. 9, of the Burnley district. The plaintiffs alleged by their statement of claim that they had recently discovered that the defendants in or about the year 1912 wrongfully and in breach of rules 31 and 94 of the rules of the Order appropriated and distributed funds of the lodge amounting to 755*l.* 6*s.* by dividing the same among the whole of the members of the lodge without having obtained the sanction of the board of directors or a certificate of dissolution from the Registrar of Friendly Societies. They further alleged that these wrongful acts constituted a breach of trust on the part of the defendants, who were personally liable to make good all sums so appropriated and divided; and that under rule 94 the funds so wrongfully dealt with had been forfeited to the general funds of the Order and were recoverable by legal process. They claimed (1.) a declaration that the defendants were personally liable to restore and make good all funds and property so divided; (2.) all necessary accounts and inquiries and orders for repayment or otherwise; and (3.) an injunction restraining the defendants from further appropriating or dividing the funds of the lodge or any part thereof.

After the delivery of the statement of claim the defendants applied to stay all proceedings in the action on the ground that by the provisions of s. 68 of the Friendly Societies Act, 1896 (1),

(1) The Friendly Societies Act, 1896, s. 68: "(1.) Every dispute between—(a) a member or person claiming through a member or under the rules of a registered society or branch, and the society or branch or an officer thereof; or . . . (c) any registered branch of any society or branch and the society or branch of which it is a branch; or (d) an officer of any such registered branch and the society or

branch of which that registered branch is a branch . . . shall be decided in manner directed by the rules of the society or branch, and the decision so given shall be binding and conclusive on all parties without appeal, and shall not be removable into any court of law or restrainable by injunction; and application for the enforcement thereof may be made to the county court."

and the rules of the Order (1), the matter ought to be referred to a general meeting of the Order for settlement.

The Vice-Chancellor, upon an appeal from an order of the registrar staying the proceedings in the action, held that the matter ought to be settled by the general meeting as provided by rule 41 of the Order.

The plaintiffs appealed.

P. O. Lawrence, K.C., and *Roby*, for the appellants. The question on this appeal is whether the matter in issue in the action can be treated as a dispute between the society and its members within the meaning of s. 68 of the Friendly Societies Act which ought by virtue of that section and the rules of the

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(1) Rule 41 provides: "Should any dispute arise between the society and the board of directors and any district, lodge, or member or past member, or person claiming through any such member, or under the rules respectively, such dispute, with the nature thereof, shall be reduced into writing, and referred to the following general meeting for settlement, except where otherwise provided by these rules."

Rule 94 provides: "(a) No lodge shall divide its funds or any part thereof without first obtaining the sanction of the board of directors and a certificate of dissolution from the Registrar of Friendly Societies, and all such funds shall be devoted solely to the carrying out the objects of the society.

"(b) Any lodge acting contrary to this rule shall forfeit the money so divided to the general fund of the society, to be recovered by legal process, and the lodge shall also be fined 5*l.*, and 10*s.* per day until the money is paid into the said general fund."

Rule 1 of the lodge rules provides: "The whole of the objects

and rules of the lodge shall be carried into effect in conformity with, and subject to the general rules of the Grand United Order of Odd-fellows, and the whole of the said rules . . . shall be applicable to the members of the lodge in the same manner as if inserted in these rules."

Rule 31: "(1.) Should the valuation of a lodge show a surplus of assets over liabilities the lodge may with the consent of the board of directors appropriate a portion of such surplus in accordance with the following provisions . . .

"(2.) Lodges desirous of appropriating surplus capital shall pass a resolution to that effect at a summoned meeting, and make application to the board of directors for that purpose. The application . . . shall state clearly the amount proposed to be appropriated to the method or methods of its disposal, which should be in accordance with the following provisions:—

"(a) Increased sickness benefit.

"(b) Increased funeral benefit, at the death of a member or member's wife."

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society to be referred to the domestic tribunal provided thereby. We submit that the respondents in what they have done have acted entirely outside the constitution of the society and have brought themselves within the ordinary jurisdiction of the Court.

The Vice-Chancellor has held that there is here a dispute which under rule 41 ought to be referred to a general meeting; but the concluding words of that rule are "except where otherwise provided by these rules," and rule 94 provides that money wrongly divided by a lodge is to be "recovered by legal process," clearly excluding reference to a general meeting.

But apart from construction of the rules the case is covered by authority.

What is complained of constitutes a violation of the fundamental provisions of friendly societies' rules, and the jurisdiction of the Court to deal with such a case is not taken away by s. 68: *Cox v. James* (1); *Cox v. Hutchinson* (2), following *Stone v. Liverpool Marine Society* (3); *Sinden v. Banks* (4); *Heard v. Pickthorne* (5); *M'Gowan v. City of Glasgow Friendly Society*. (6) The action is clearly maintainable and the order of the Vice-Chancellor was wrong.

*Jenkins, K.C.*, and *T. C. Eastwood*, for the respondents. It is said that the concluding words of rule 41 take this case out of that rule, and reliance is placed upon rule 94 (b), but no claim to forfeiture is made under that rule in the pleadings.

[LORD COZENS-HARDY M.R. We shall deal with this case upon the question of principle and not upon a point of pleading.]

A dispute has clearly arisen here under rule 41, which is very wide in its terms. The dispute is between the society and the lodge and/or its members.

[KENNEDY L.J. referred to *Municipal Permanent Investment Building Society v. Richards*. (7)]

*P. O. Lawrence, K.C.* The words of the Act upon which that case was decided are materially different.]

(1) (1882) Diprose, 282.

(2) [1910] 1 Ch. 513, 517.

(3) (1894) 63 L. J. (Q.B.) 471.

(4) (1861) 3 E. & E. 623.

(5) [1913] 3 K. B. 299.

(6) 1913 S. C. 991.

(7) (1888) 39 Ch. D. 372, 383.

This is not a case of fraudulent malversation of funds. The case alleged against the respondents is that they have dealt with funds in a manner which is not within the rules and the Act: *Andrews v. Mitchell*. (1) There is no fraudulent breach of trust here, but merely a dispute within rule 41 and s. 68.

*Sinden v. Banks* (2) was a case of personal misappropriation of the money, whereas here there is a mere application of funds which is alleged to be not in accordance with the rules. If *Sinden v. Banks* (2) was rightly decided, it does not apply to this case.

In *Heard v. Pickthorne* (3) the view was taken that the jurisdiction of the Court to interfere in such cases depends upon whether the question is one of internal administration or not. If that be correct, then *Cox v. Hutchinson* (4) was wrongly decided. As to rule 94 (b), the provision that the money may be recovered by legal process comes into operation after the dispute has been determined in the regular way under the rules.

*P. O. Lawrence, K.C.*, in reply. The liability of the trustees does not entirely depend upon the rules. There is a statutory liability upon them. See Friendly Societies Act, 1896, s. 49. Sect. 9, sub-s. 3, and Sched I. show that the rules are statutory, and upon proof of a breach of the rules the trustees become liable under s. 49. There is no dispute here under rule 41, but a pure liability upon the respondents to account under the Act not qua members but qua trustees. The money wrongly divided has been forfeited to the society, and the plaintiffs are the proper persons to sue.

*Cur. adv. vult.*

Dec. 10. LORD COZENS-HARDY M.R. The judgment I am about to read is the judgment of the Court (Lord Cozens-Hardy M.R., Kennedy L.J., and Warrington J.).

This appeal from an order of the Vice-Chancellor staying all further proceedings in the action raises an important question under the Friendly Societies Act, 1896. Can an action be maintained against the trustees of a lodge registered as a branch

(1) [1905] A. C. 78.

(2) 3 E. & E. 623.

(3) [1913] 3 K. B. 299.

(4) [1910] 1 Ch. 513.



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under the Act, or must the matter be decided by the domestic tribunal of the lodge under s. 68?

The plaintiffs are the trustees of the Grand United Order of Oddfellows Friendly Society. Three of the defendants are the trustees of the Lord Nelson Lodge, No. 9, of the Burnley district of the Order. A fourth defendant is the secretary, and the fifth defendant is the treasurer of the lodge. The statement of claim sets out rule 31 of the Order, which says: "By rule 31 of the said rules, a lodge is empowered with the consent of the board of directors to appropriate surplus capital in the payment of additional benefits as stated in the said rules." It also sets out rule 94, which is: "No lodge shall divide its funds or any part thereof without first obtaining the sanction of the board of directors and a certificate of dissolution from the Registrar of Friendly Societies, and all such funds shall be devoted solely to carrying out the objects of the society. (b) Any Lodge acting contrary to this rule shall forfeit the money so divided to the general fund of the society, to be recovered by legal process, and the lodge shall also be fined 5*l.*, and 10*s.* per day until the money has been paid into the said general fund." It also sets out rule 1 of the rules of the lodge: "The whole of the objects and rules of the lodge shall be carried into effect in conformity with, and subject to the general rules of the Grand United Order of Oddfellows, and the whole of the said rules and any alterations or amendments thereof hereafter made and registered shall be applicable to the members of the lodge in the same manner as if inserted in these rules."

Paragraphs 9 and 10 are as follows: "(9.) The plaintiffs have recently learnt that the defendants in or about the year 1912 wrongfully and in breach of rules 31 and 94 of the rules of the Order appropriated and distributed funds of the said lodge amounting so far as the plaintiffs are at present able to ascertain to 755*l.* 6*s.*, by dividing the same among the whole of the members of the said lodge without having obtained the sanction of the board of directors or a certificate of dissolution from the Registrar of Friendly Societies. (10.) Such wrongful appropriation and division constituted a breach of trust on the part of the defendants, and the defendants are personally liable to make good

all sums so appropriated and divided. By the provisions of the said rule 94, the funds so wrongfully divided have become forfeited to the general funds of the Order, and are recoverable by legal process."

And then the claim is as follows: "(1.) A declaration that the appropriation by the defendants as trustees and officers of the said lodge of the funds thereof and the division of the same among the members of the said lodge were and are breaches of trust by the defendants and that the defendants are personally liable to restore and make good all funds and property so divided as aforesaid. (2.) All necessary accounts and inquiries and orders for repayment and otherwise. (3.) An injunction to restrain the defendants from further appropriating or dividing the funds of the said lodge or any part thereof."

Now the language of s. 68 is very wide: "Every dispute between . . . (d) an officer of any such registered branch and the society or branch of which that registered branch is a branch . . . shall be decided in manner directed by the rules." It has, however, been decided in many cases that the dispute to which the section applies must be between the society and a person in his capacity as a member. For example, a society can sue a member for appropriate relief under a mortgage granted by a member to the society. (See *Morrison v. Glover* (1), *Prentice v. London* (2), and *Mulkern v. Lord*. (3))

It remains to consider what is the legal position of trustees of a friendly society. By s. 49, sub-s. 1, all the property of a society vests in the trustees, who need not be members. By s. 9, sub-s. 3, under the First Schedule, clause 2, the rules must provide the purposes for which the funds of the society are to be applicable. This is done in rule 28 of the lodge rules. If the trustees apply the funds in a manner not authorized by the rules and indeed expressly prohibited by the rules, they are guilty of a breach of trust. They are liable to be sued not in their character of members, for they need not be members, but in their character of trustees in whom property is vested by Act of Parliament to be held upon certain trusts. What we have said about an action

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(1) (1849) 4 Ex. 430, 444.

(2) (1875) L. R. 10 C. P. 679.

(3) (1879) 4 App. Cas. 182.

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against the trustees applies in principle also to the secretary and treasurer in so far as they have been parties to the breach of trust. They stand in a fiduciary position. The Court of Queen's Bench, more than fifty years ago, held that a treasurer might be sued for money had and received, and that the section of the Act then in force corresponding to s. 68 did not take away the common law right of action: *Sinden v. Banks*. (1) That authority has never been questioned. The present action is not a common law action, but is an equitable action claiming relief by a beneficiary against the trustees, and the same principle must apply. Chitty J. in *Cox v. James* (2) granted the precise relief sought in the present case. It is true that the point under the section corresponding to s. 68 was not taken, probably because counsel thought it was not a sound point after *Sinden v. Banks*. (1)

In our opinion, the order of the Vice-Chancellor was wrong. The action ought not to be stayed, and the defendants must put in a defence.

We prefer to base our decision upon the general ground that this is not a dispute within the meaning of s. 68. But our decision might be based upon the particular rules of the society. Rule 41 provides that a dispute shall be "reduced to writing and referred to the following general meeting for settlement except where otherwise provided by these rules," and rule 94 does otherwise provide, for it says that money wrongly divided by a lodge is to be "recovered by legal process"—words which exclude settlement by a general meeting.

In the view which we take it is not necessary to consider the authorities which have been cited as to the circumstances in which certain disputes between a society and a member in his capacity as a member may still be dealt with by the Court.

The result is that the appeal must be allowed and the defendants must pay the costs here and below.

Solicitors: *Cobbett, Wheeler & Cobbett, Manchester; Roberts & Riley, Birmingham.*

(1) 3 E. & E. 623.

(2) Diprose, 282.

*In re* WILLIAM THOMAS & CO., LIMITED.  
WILLIAM THOMAS & CO., LIMITED *v.* SULLY.

[1914 W. 2344.]

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Nov. 17.

*Company—Memorandum of Association—Construction—Power to sell for Shares in New Company—Union of Interests or Amalgamation.*

The plaintiff company carried on the business of brick manufacturers at Wellington, Somerset, having a branch property and business at Taunton adjoining certain other brick works belonging to the C. company, which carried on a similar business to that of the plaintiff company. By its memorandum of association the plaintiff company had power to sell or otherwise deal with all or any part of its property “in such manner and on such terms and for such purposes” as it should think proper, and also to “make and carry into effect arrangements with respect to the union of interests, or amalgamation, either in whole or in part, with any other company” having similar objects. It was proposed that the plaintiff company and the C. company should sell their Taunton businesses to a new company to be formed for that purpose in consideration of shares or debentures in the new company, the plaintiff company and the C. company also providing the necessary working capital by applying and paying for shares or debentures in the new company. On a summons under Order LIV.A to determine whether the plaintiff company could validly carry out the proposed arrangement:—

*Held*, that on the true construction of its memorandum of association the plaintiff company had power to sell its Taunton business in consideration of shares or debentures in the new company, and to provide working capital in the way proposed.

ADJOURNED SUMMONS.

This was an originating summons taken out under Order LIV.A of the Rules of the Supreme Court, 1883, by the plaintiff company against Alfred Wyllie Sully as defendant, who by resolution of the plaintiff company was duly appointed to represent himself and all other shareholders, for the determination of the following questions:—

“1. Whether on the true construction of its memorandum of association the plaintiff company has power to sell the portion of its business premises, known as the New Road Brick Works near Taunton in the county of Somerset, with or without all or



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any of the stock in trade, dead and alive plant, machinery and effects, belonging to such business premises, and the goodwill of the business there carried on, for any and what consideration it may think fit; and in particular for all or any and which of the following, viz., debentures (mortgage or otherwise), debenture stock, preference, ordinary preferred or deferred, or ordinary stock or shares, and whether issued as fully or partly paid up, of and in any company formed or to be formed under the Companies Acts, 1908 and 1913, and whether or not formed for the express purpose of purchasing (inter alia) all or any part of the premises above mentioned.

“2. Whether on the true construction aforesaid the plaintiff company is entitled to apply its assets, funds and moneys, in order to provide all or any part of the working capital of any such purchasing company in applying and paying for debentures (mortgage or otherwise), debenture stock, or other such stock or shares as aforesaid, of and in such purchasing company.”

The plaintiff company was incorporated in 1866 under the Companies Act, 1862, for the objects stated in clause 3 of its memorandum of association. So far as material these included:—

(1.) The purpose of purchasing or otherwise acquiring certain beds of clay, brick earth, and works, lands and hereditaments situate at Poole, in the parish of Wellington in the county of Somerset, and any other hereditaments, beds of clay, brick earth, plant, machinery and premises, situate in any part of England or Wales, which should be thought desirable and convenient for the management and extension of the company's business.

(2.) The carrying on of the trades and businesses of brick, tile, drain pipe, and manure manufacturers, potters and lime-burners, and of brick, tile, pipe, pottery, manure, and general merchants.

(3.) “The purchasing the goodwill or any interest in any trade or business of a nature or character similar to any trade or business which the company is authorised to carry on.”

(5.) “The draining, paving, planting, building on or otherwise improving and realising, all or any part or parts of the lands and premises from time to time purchased, taken in exchange or on lease or otherwise acquired by the company; and the

managing, farming, cultivating, maintaining, improving, under-letting, setting, leasing, assigning, transferring, exchanging, selling, mortgaging, charging or otherwise dealing with and disposing of, all or any part or parts of the lands, hereditaments and real and personal estates, properties and effects of the company, in such manner and on such terms and for such purposes as the company shall think proper."

(7.) "The making and carrying into effect arrangements with respect to the union of interests, or amalgamation, either in whole or in part, with any other company or companies or persons having objects similar to those of this company; and the establishing and regulating of agencies, whether in the United Kingdom or abroad, for the purposes of the company."

(9.) "The doing all such other things as are incidental or conducive to the attainment of the above objects."

In addition to the principal works at Poole the plaintiff company had acquired a branch brick and tile business, known as the New Road Brick Works, situate at Bishops Hall, near Taunton.

Adjoining the New Road Brick Works of the plaintiff company were other brick and tile works belonging to Cornishes, Limited, a company incorporated under the Companies Acts, 1862 to 1900, and carrying on a similar business to that of the plaintiff company.

It was proposed to amalgamate the New Road Brick Works of the plaintiff company situate at Bishops Hall, Taunton, with the brick works of Cornishes, Limited, by means of the formation of a new company to whom the two properties and the assets connected therewith should be sold in consideration of shares or debentures in the new company, the plaintiff company and Cornishes, Limited, also providing between them the necessary capital; and the plaintiff company took out this summons for the purpose of ascertaining whether it had power to carry out the proposed transaction.

*F. E. Farrer*, for the plaintiff company. The memorandum of association by clause 3, paragraph 5, empowers the plaintiff company to dispose of any part of its property "in such manner

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and on such terms " as the company shall think fit. This power is in the widest possible terms and cannot be limited to a power to sell for cash only. Even trustees are not bound to sell for cash in all cases. In *Scarborough Corporation v. Cooper* (1) Joyce J. held that a municipal corporation had power with the approval of the Local Government Board to dispose of its corporate lands in consideration of a perpetual yearly rent-charge. If the plaintiff company can sell as proposed, it can also provide working capital for the new company in the same way. That is a necessary feature of carrying out the proposed amalgamation or union of interests authorized by paragraph 7 of clause 3 of the memorandum.

*W. G. Fellowes*, for the defendant. The plaintiff company has no power to sell except for cash and has no power to become a shareholder in the proposed new company. It is "beyond the province of one trading corporation to become a shareholder in another, and to apply its funds for that purpose": per Lord Cairns L.J. in *In re Barned's Banking Co.* (2); and this proposed amalgamation is not within the powers of this memorandum of association.

[WARRINGTON J. Lord Cairns in that case goes on to point out that the general proposition may be controlled by the memorandum of association.]

The powers conferred by the memorandum in that case were much wider than in the present case. The word "amalgamation" in paragraph 7 of clause 3 is a commercial term and points rather to an amalgamation of the entire undertaking of the plaintiff company and not to a proposed sale of part of its property.

WARRINGTON J. The question in this case is whether the plaintiff company has power under its memorandum of association to sell a branch business and the assets connected therewith to another company in consideration, in whole or in part, of debentures or shares of that company. The plaintiff company was established in the year 1866 for the main purpose of purchasing and taking over a brickmaking business, formerly

(1) [1910] 1 Ch. 68.

(2) (1867) L. R. 3 Ch. 105, 112.

the property of one William Thomas. In addition to that original business at Wellington in Somerset, the plaintiff company has a branch business near Taunton; and immediately adjoining their works near Taunton another company, called Cornishes, Limited, has a precisely similar undertaking. It has been thought that it would be to the advantage of both these companies to join their forces, and to effect that by each company selling to a new company its Taunton business, that is to say, the plaintiff company selling not its entire undertaking, but its branch business at Taunton, and Cornishes, Limited, selling its whole business, as I understand, to a new company, each company receiving shares or debentures in the new company. There is no doubt, I think, that the proposed arrangement would be to the advantage of the plaintiff company, and the only question is whether it is authorized by the memorandum of association of the plaintiff company. Generally speaking, it is true that a limited company, under the Act of 1862, cannot acquire shares in another company unless its memorandum of association authorizes it to do so; and, accordingly, one has to see in this case whether the memorandum of association is sufficiently wide for the purpose. The material clauses of the memorandum of association are as follows: [His Lordship referred to clause 3 of the memorandum of association above set out, reading at length paragraphs 5 and 7, and continued:] Now is it within the power of this company to sell this branch business for shares? It is plainly within its power to sell; there is no question about that. Under paragraph 5 of clause 3 it is within the power of the company to sell or otherwise deal with and dispose of this branch business "in such manner and on such terms and for such purposes as the company shall think proper." Those terms are the widest that can possibly be invented, and in my opinion clearly authorize the sale of a branch business for shares, unless there is something in the general law, or something else in the memorandum of association, which would prohibit the company from so selling. I have already observed in the course of the argument that, on the authority of Lord Cairns in *In re Barned's Banking Co.* (1), if the company is to be held to have power to

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sell for shares, it must be because it is authorized so to do by its memorandum of association. In that particular case the company in question was in terms authorized to take shares in other companies. In the present case there is no such express authority; but express authority is not required if I can find a sufficient authority in the memorandum according to the true construction of the document, and in my opinion I do find sufficient authority in this memorandum. In the first place, there are the very wide terms of paragraph 5, to which I have already referred, placing no limit upon the manner, terms, or purposes for which the company may sell; but in addition to that, I think that this memorandum clearly contemplates that the company may find it desirable in its interests, and in that event shall have power, to take shares in another company. I am alluding to paragraph 7 of clause 3, which defines one of the objects of the company to be "the making and carrying into effect arrangements with respect to the union of interests or amalgamation, either in whole or in part, with any other company or companies or persons having objects similar to those of this company." Assuming that "amalgamation" generally means the formation of some new company to take over the entire undertaking of the company in question, I find in this paragraph of the memorandum something much wider. What is really proposed, although of course the machinery for carrying it into effect is not the same, is to effect a union of interests between the plaintiff company and Cornishes, Limited, with regard to their two Taunton businesses. To effect a union of interests with another company may, I think, and almost inevitably must, involve the taking by the plaintiff company at all events of shares in another company, and might involve the taking of shares in the plaintiff company by that other company; but at all events it involves the taking and holding by the plaintiff company of shares in another company, the union of interests between which and the plaintiff company is to be carried into effect. In my opinion, on the construction of the memorandum taken as a whole, the plaintiff company has power to sell its Taunton business for any consideration which it may think fit; and I make a declaration accordingly in the terms of the first question raised by the summons.

As regards the second question raised by the summons, whether the plaintiff company may apply its assets in order to provide working capital for the proposed new company and for that purpose apply and pay for debentures or shares, I think the plaintiff company may clearly do that. If the plaintiff company, as provided by paragraph 7, may make and carry into effect "arrangements with respect to the union of interests" with any other company, those arrangements may obviously be of the widest possible nature; and moreover, even if the matter does not strictly come within the terms of paragraph 7, as I think it does, at any rate it is something "incidental or conducive" within paragraph 9 of clause 3 to the attainment of that union of interests. Accordingly I answer both questions raised by the summons in the affirmative.

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Solicitors: *Wansey, Stammers & Co., for E. Lee Michell, Wellington, Somerset.*

A. C.

*In re* AN APPLICATION BY CADBURY BROTHERS, LIMITED, NEVILLE J.  
FOR THE REGISTRATION OF A TRADE MARK, 1914  
No. 314,919. *Nov. 25, 26.*

[1914 C. 2502.]

*Trade Mark — Application to register — Surname — "Cadbury" — Distinctive Word — "Adapted to distinguish" — Trade Marks Act, 1905 (5 Edw. 7, c. 15), ss. 3, 9, 44—Trade Mark Rules, 1906, rr. 39, 129.*

On an *ex parte* motion by Cadbury Brothers, Limited, to the Court, pursuant to r. 129 of the Trade Mark Rules, 1906, for an order on the Registrar of Trade Marks to proceed with their application under s. 9, sub-s. 5, of the Trade Marks Act, 1905, for the registration of the word "Cadbury" as their trade mark in respect of certain goods, the Court, being of opinion on the evidence that the word by long user in connection with the goods in question indicated and was distinctive of the goods manufactured by the applicants and by them only, and was adapted to distinguish such goods from those of any other person, ordered the application to be proceeded with.

# MOTION.

In 1886 the word "Cadbury" was registered as an old mark by Cadbury Brothers, Limited, or their predecessors in title, in

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— ever since been used by them as such. In July, 1909, they applied  
to the Registrar of Trade Marks under s. 9, sub-s. 5, of the Trade  
Marks Act, 1905, for the registration of the same word as their  
trade mark in respect of certain other goods in the same class,  
namely, "chocolate confectionery, chocolate biscuits, sugar con-  
fectionery, bon-bons composed of nuts or fruits, crystallized  
flowers (being confectionery), and boiled sugar goods (being con-  
fectionery)"; and subsequently they amended their application  
by including the goods "cocoa and chocolate."

The case lodged with the application stated:—

"1. The applicants, Cadbury Brothers, Limited, carry on  
business at Bournville, near Birmingham, Worcestershire, as  
cocoa, chocolate, and confectionery manufacturers and tea  
merchants.

"2. The said business was established by the applicants' pre-  
decessors and has been carried on by them and the applicants (all  
of whom are hereinafter included in the term 'the applicants')  
since about the year 1850.

"3. The goods in respect of which the applicants are seeking  
to register their aforesaid distinctive name and trade mark have  
been and are manufactured and sold in the said business to a  
very great and increasing extent, the same having been in fact  
sold to the value of millions of pounds sterling, and the sale of  
such goods is at the present time at the rate of hundreds of  
thousands of pounds sterling per annum.

"4. The distinctive name and trade mark under which such  
goods have been and are being sold has been and is 'Cadbury,'  
which was adopted and used for that purpose and has no refer-  
ence to any fact relating to the goods except to indicate that  
they are of the applicants' manufacture.

"5. The said distinctive name and trade mark 'Cadbury' has  
been and is habitually and continuously used by placing the  
same upon the receptacles containing the applicants' goods and  
also where possible on the goods themselves, and also by dis-  
playing the same in the applicants' catalogues, price lists, adver-  
tisements, and in fact in every way in which it would be likely  
to attract the notice of purchasers of such goods.

“6. The applicants have expended many thousands of pounds sterling in bringing their goods sold under their said trade mark to the knowledge of the public.

“7. The said distinctive name and trade mark ‘Cadbury’ is and long has been universally recognized by the trade and public as indicating exclusively that the above mentioned goods to which the same is applied or in respect of which it is used are goods manufactured and sold by the applicants.

“8. The aforesaid goods of other makers have never been called or described by the said name and trade mark, the use of which has been exclusively confined to such goods manufactured and supplied as aforesaid.

“9. The applicants are desirous that, for the protection of their own business and also of the trade and the public purchasing their goods, their said distinctive name should be registered as their trade mark and protected under the provisions of the Trade Marks Act.”

In December, 1910, the application came before the Registrar, who, without dealing with it, referred it to the Board of Trade; and they, without deciding it, required the applicants to apply by motion to the Court, pursuant to r. 129 of the Trade Mark Rules, 1906, to hear and determine the application. Accordingly Cadbury Brothers, Limited, now moved the Court for an order that the Registrar of Trade Marks might be directed to proceed with their above mentioned application.

A considerable body of evidence, amounting in all to some 233 statutory declarations, was filed in support of the application, and the Court intimated that the declarations might be read at the hearing of the motion in lieu of evidence by affidavit: see [1914] W. N. 391. This evidence is sufficiently noticed in the arguments and judgment.

*A. J. Walter, K.C.*, and *L. B. Sebastian*, for the motion. By s. 3 of the Trade Marks Act, 1905, “a mark” includes a name; and a “trade mark” means a mark used or proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, or dealing with or offering them for sale. Sect. 9

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NEVILLE J. gives the essentials of a registrable trade mark, sub-s. 4 excluding 1914 "a geographical name or a surname," and then sub-s. 5 says  
 CADBURY "any other distinctive mark," but a name or word other than such  
 BROTHERS' as fall within sub-ss. 1 to 4 shall not be registered except by order  
 APPLICA- of the Board of Trade or the Court. The proviso at the end of  
 TION, the section is only intended to be a guide to the Court in coming  
*In re.* to a conclusion on the evidence. A geographical name is  
 registrable as a trade mark: *In re Apollinaris Trade Mark* (1);  
*In re California Fig Syrup Co.* (2); and in *Teofani & Co. v.*  
*Teofani* (3) there are dicta in the judgments of the Court of  
 Appeal that a surname may be capable of registration as a trade  
 mark if it is distinctive. In that case the surname "Teofani"  
 was on the register of trade marks and an application to expunge  
 it was refused. The proper time for considering whether a mark  
 is registrable, or whether, having regard to the interests of the  
 public, it ought to be accepted, is when the application for its  
 registration first comes before the Registrar, and the test is  
 whether the mark is adapted to distinguish the goods of the  
 applicant from those of others, and whether other traders are  
 likely, in the ordinary course of their business and without  
 improper motive, to desire to use the same mark in connection  
 with their goods: *Registrar of Trade Marks v. W. & G. Du*  
*Cros.* (4) It is a question of evidence in each case, and the  
 Court has a discretion in the matter: *Eno v. Dunn.* (5) The  
 present application was referred by the Registrar to the Board of  
 Trade and by their direction is brought before the Court, so  
 that it is now or never whether the application shall proceed.  
 Admitting that an application to register a surname must be  
 closely scrutinized and registration only permitted where the  
 distinctive character of the mark is clearly proved—*Teofani*  
*& Co. v. Teofani* (6)—we have a large body of evidence  
 covering the whole of the United Kingdom which shows that  
 the word "Cadbury" has for the last sixty years been so  
 extensively used in connection with these goods of the applicants  
 as to be distinctive of their goods. No one has ever heard of the

(1) [1907] 2 Ch. 178.

(2) [1910] 1 Ch. 130.

(3) [1913] 2 Ch. 545.

(4) [1913] A. C. 624, 633, 635.

(5) (1890) 15 App. Cas. 252.

(6) [1913] 2 Ch. 545, 569.

word "Cadbury" in connection with these goods except as denoting the applicants' goods, and the word is, it is submitted, adapted to distinguish their goods from those of other persons. There is no conflicting mark on the register, and no injustice will be done to any other person, because s. 44 of the Act protects a trader in the bona fide use of his own name.

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*Austen-Cartmell*, for the Board of Trade. The Board do not oppose the application, but desire their views to be placed before the Court. It is not disputed that a name may be capable of registration as a trade mark if it is distinctive, but it is submitted that prima facie a surname per se is not adapted to distinguish unless it is so rare and uncommon as to be adapted to distinguish. The word must be such that it is inherently capable of being a trade mark. It is not enough if the word by long user has acquired the capacity of distinguishing the goods: *In re Joseph Crosfield & Sons* (1); *In re Leopold Cassella & Co.* (2) Since the Act of 1905, *Teofani & Co. v. Teofani* (3) is the only instance of a surname being registered as a trade mark, but it is an exceptional case and is distinguishable from the present. "Teofani" was a very rare and uncommon name and was on the register, and in an action by the owners of the trade mark for an injunction to restrain the defendant from fraudulently passing off his goods as the goods of the plaintiffs, the defendant sought to protect himself by moving to expunge the mark from the register, and the Court refused his application. In *In re Pope's Electric Lamp Co.* (4) and *In re R. J. Lea's Application* (5) an application to register a surname was refused. It cannot be said that the word "Cadbury" is so rare and uncommon as to be adapted to distinguish the applicants' goods although it may have by user have acquired the capacity to distinguish their goods, and it is submitted that the Court in the exercise of its discretion should not make the order. Hamilton L.J. in *In re R. J. Lea's Application* (6) points out the difficulty with regard to surnames, and that it is not safe to rely exclusively on the protection afforded by s. 44 of the Act to persons acting in good

(1) [1910] 1 Ch. 130.

(2) [1910] 2 Ch. 240.

(3) [1913] 2 Ch. 545.

(4) [1911] 2 Ch. 382.

(5) [1913] 1 Ch. 446.

(6) [1913] 1 Ch. 464.

NEVILLE J. faith. The applicants must prove that the word is distinctive and that they are in fact using it as a trade mark in respect of these goods, but there is no evidence of its user as a trade mark outside the goods covered by the old mark. The evidence only shows that it is descriptive of the goods of the applicants, and then the test is whether the name is so peculiar and rare as to be capable of registration as a trade mark.

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*A. J. Walter, K.C., in reply.*

NEVILLE J. I have been referred to a dictum of an eminent judge to the effect that a surname is suitable for use as a trade mark. With the greatest possible respect, it appears to me that nothing can well be less suitable for the purposes of a trade mark than a surname. A trade mark, in the ordinary acceptance of the term, connotes monopoly, and it is inconceivable that the Legislature should think fit to give any one a monopoly in the use of a surname. The right to the surname that a man uses is shared with every person who elects to use the same name, and, consequently, he has got about as much monopoly in it as he has in the air that he breathes. He has to share it in common with all his fellow citizens who wish to use it. I must say that my intellectual sympathies are very strongly on the side of the arguments against the registration of a surname in some of the cases that have been cited, but I think that, effective from one point of view as those arguments are, they overlook the fact that the Courts are not now in any way concerned with the policy of the law with regard to trade marks, but have to consider the legislation which has been passed concerning them, and to give effect to it, subject to this, that they have a discretion in cases like the present which in my opinion ought to be used not with a view of modifying the intentions of the Legislature, but of seeing that they are carried out. In considering the meaning of the present Act it is needless for me to mention the construction I should have put upon it if I had been left without the assistance of authority, but I would observe that when once under sub-s. 5 a geographical name has been held to be capable of being a distinctive mark, then the argument that a distinctive mark cannot include a surname seems to me to be repelled by logical inference.

The exclusion under sub-s. 4 is "a geographical name, or a sur- NEVILLE J.  
name." If that sub-section excludes those words as trade marks altogether so that they cannot come in under the words "any other distinctive marks," it is just as true of a geographical name as it is of a surname. I therefore think that a surname may be registered as a trade mark in certain cases which are to some extent defined by the Act. Now although, *prima facie*, a trade mark connotes monopoly and gives the person who is entitled to register a mark a monopoly in the use of that mark, the Legislature with regard to surnames has stopped short of that, because although the Act, upon the construction that has been put upon it, includes a surname, it provides in effect by s. 44 that there shall be no monopoly granted by the registration of the mark, and that every man shall be entitled to the bona fide use of his own name as freely as before. The consequence is of course that, if and when a surname is placed upon the register, it only gives a limited right. But at the same time it gives a right which may be of very great importance because, whereas prior to the registration a trader might find it necessary in every case, where goods were being dealt with under circumstances which were calculated to mislead the public, to prove that his goods were known under a particular name, or as being the manufacture of a particular person, when once he has registered he has a better remedy, inasmuch as he can sue upon his trade mark. Consequently, the desire to be registered is a perfectly intelligible desire, even in the case of a surname where no monopoly results from the registration.

I have then to ascertain whether this name "Cadbury" is distinctive in the sense of being "adapted to distinguish the goods of the proprietor of a trade mark from those of other persons." In determining that question I am entitled to "take into consideration the extent to which such user has rendered such trade mark in fact distinctive of the goods in respect of which it is registered or proposed to be registered," and I have at all events the dicta of the judges in the Court of Appeal to show that that means user as a trade mark. I confess that that is the conclusion at which I should have arrived if I had not been assisted by authority, but at the same time I do not think that non-user as a trade mark is conclusive. I think there may be

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NEVILLE J. cases in which a name is adapted to distinguish the goods of a proprietor from those of other persons even where there has been no user of the word as a trade mark prior to the application to register. The present case is typical of a certain class. The applicants, Cadbury Brothers, Limited, are upon the register in respect of cocoa and chocolate in the name "Cadbury." It is unnecessary to consider how or why they came to be upon the register in that way, they are there. Without any distinctive form of name the name itself is registered as a trade mark for articles comprised under the head of "cocoa and chocolate"; and what they are now seeking is the further registration of the same name in the same manner in respect of other branches of the confectionery trade. I think the question which I have to determine is this: Is the name "Cadbury" distinctive of goods manufactured by the firm of Cadbury Brothers, Limited? That depends to my mind upon a consideration of the facts with regard to the user of that name. I find that for sixty years Cadbury's business in one form or another has been carried on, and I think I am entitled to say from the evidence,—I shall have a word or two to say upon the evidence itself later—coupled with such general knowledge as every judge of fact must always introduce into his determination, that throughout the United Kingdom the name "Cadbury" is associated with the manufacture of one firm, and one firm alone. The evidence is that throughout the whole of that period there has been no other known person of the same name in the confectionery trade, and that Cadbury's when a private firm, and afterwards as a limited company, have invariably associated with the sale of their goods the name "Cadbury," which has always formed a part of the name of the firm or company. I think probably they are better known with regard to chocolate and cocoa than they are with regard to other items of the confectionery trade, but it is perfectly true to say that, speaking generally, any person who was given Cadbury's confectionery, and told it was Cadbury's confectionery, would at once assume that it was the product of the particular company connected with that name. Now is that enough to make the name a distinctive name capable of registration as a trade mark? What is meant by "distinctive,"

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except that when you see the name your mind immediately refers NEVILLE J. to the person or firm or company who sold or manufactured the article, and to that one person or firm or company alone? I do not see how I can give a rational interpretation to the word "distinctive" unless I hold that where "Cadbury" means in everybody's mind the product of a particular company, that name has become distinctive of the goods of that particular company.

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Now with regard to the evidence it refers generally to the name "Cadbury" as though it had been used throughout as a trade mark. I have seen the exhibits which have been produced in confirmation of the evidence to that effect, but I do not think that they bear out the statement. It is quite true that they show that the word "Cadbury" has been used, if not universally at all events generally, by the firm of Cadbury Brothers, Limited, in the sale of their goods, but they do not show that attention has been called to the use of the word as a trade mark. Nobody looking at the way in which the goods were packed, and the way in which the goods were marked, would necessarily be led to the conclusion that "Cadbury" was a trade mark. But I have this, that the word has been used on the goods in all, or nearly all, the exhibits, and I think that what the manufacturer has relied upon has been the knowledge of the association of the name "Cadbury" with Cadbury Brothers, Limited, and their business, that is to say, the articles are called "Cadbury's chocolate," "Cadbury's cocoa," and "Cadbury's chocolate biscuits," and so on, which, I think, is not the use of the name as a trade mark, but a direct representation that the goods are made by the company which is connected with the name "Cadbury," or "Cadbury Brothers." As I have said before, I have not got the assistance from the actual user that I might have had if the habit of the firm had been to sell exclusively under the trade mark "Cadbury," but still I have abundant evidence to show that the method in which they have sold their goods has been adapted to produce the very effect which has been produced, that is, the association of the word "Cadbury" with a particular manufacture. Ought I in those circumstances, in the exercise of my discretion, to direct the registration to proceed, which is all that I have to consider on the present occasion, because the present

NEVILLE J. application, subject to the assistance that I have had from counsel for the Board of Trade, is ex parte? In my opinion I ought to do so. Giving to the word "distinctive" the interpretation that I have already endeavoured to express, I do not see how, if the registration of a name is to be excluded in this case, it ever could be admitted; I cannot imagine a case in which, looked at from the point of view I have referred to, it could be said with greater confidence that the name was adapted to distinguish the goods as the goods of one particular maker. I am of opinion, therefore, that the application succeeds. The order will be that the Registrar do proceed with the application.

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 CADBURY  
 BROTHERS'  
 APPLICA-  
 TION,  
*In re.*  
 —

Solicitors: *Timbrell & Deighton*; *Solicitor to the Board of Trade.*

H. L. F.

NEVILLE J. *In re* LAW GUARANTEE TRUST AND ACCIDENT  
 SOCIETY.  
 GODSON'S CLAIM.

1914  
 —  
*Dec. 1, 2.*  
 —

[00422 of 1909.]

*Company—Debenture Issue—Assurance Society Trustees of Debenture Trust Deed—Debentures guaranteed by Assurance Society—Re-insurance of Risk—Liquidation of Company and of Society—Debenture-holders' claim to Re-insurance Moneys.*

A brewery company made a debenture issue with a trust deed of which an assurance society were the trustees. By a contract indorsed on each debenture the society guaranteed the registered holder payment of the principal and interest secured by the debenture if the brewery company should make default. The society received for this guarantee a consideration in the nature of an annual premium, and also an annual fee for acting as trustees, the payment of which was provided for by the trust deed. The society then re-insured part of their risk under their guarantee with another insurance company. Subsequently both the brewery company and the society went into liquidation, and the debentures remained unpaid.

A purchaser of all the debentures of the brewery company proved in the liquidation of the society for the amount due under the debentures after deducting the value of his securities, and his proof was admitted. He also claimed to be entitled, as against the general creditors of the society, to the benefit of all re-insurances effected by the society in connection with the debentures:—

*Held*, that he was not so entitled. Although under the trust deed

there was a fiduciary relation between the society and the debenture-holders, there was no fiduciary relation between them under the contract by which the payment of the debentures was guaranteed.

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CLAIM.

## ADJOURNED SUMMONS.

This was an application by one Godson, the holder of the whole of the debenture issue of the Bedford Brewery (Plymouth), Limited, which was guaranteed by the above-named society, for a declaration that he was entitled to the benefit of all re-insurances effected by the society in connection with such debentures, in these circumstances.

On March 5, 1901, the Bedford Brewery (Plymouth), Limited (hereafter called the company), made a debenture issue of 100,000*l.* in bonds of 100*l.* each bearing interest at  $4\frac{1}{2}$  per cent. per annum, and by a trust deed of the same date the company conveyed the whole of its undertaking and property to the society upon usual trusts for the benefit of the debenture-holders. For acting as such trustee the society received a fee of 105*l.* per annum, payable on March 5 in each year, the amount to be increased to 210*l.* per annum in the event of the security becoming enforceable. The society received the fee of 105*l.* per annum up to the year 1908 (when the security became enforceable), and received the fee of 210*l.* for the years 1909 and 1910.

All the debentures were issued on March 5, 1901, and by the terms thereof the company covenanted to pay the registered holder interest at the rate of  $4\frac{1}{2}$  per cent. half-yearly on June 30 and December 30 in each year, and to pay the principal on December 31, 1910, or (*inter alia*) when default should have been made in the payment of any interest for three calendar months after it became due and the holder had given notice to the company requiring payment, or when an order should have been made by any competent Court or an effective resolution should have been passed by the company for winding up the company.

The trust deed recited that the society had agreed to guarantee the debentures, and accordingly the usual guarantee of the society was written at the foot of each debenture, and thereby the society guaranteed the payment of both principal and



NEVILLE J. interest secured by the debenture if the company made default, and the guarantee was signed by a director and the assistant secretary of the society and was also dated March 5, 1901. The society received for this guarantee a premium of 15*s.* per cent. of the debentures, and of this amount part was commuted by a cash payment of 1098*l.* 5*s.* 3*d.* on the inception of the risk, and the balance was payable each March 5 at the rate of 10*s.* per cent. on the amount of the debentures outstanding. The payment of this guarantee premium and of the fee of 105*l.* per annum above mentioned, and also of the costs, charges, and expenses incurred by the society whilst acting as trustee, was provided for by certain clauses of the trust deed. The society received this guarantee premium up to March, 1909.

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—

On March 14, 1901, the society, in the usual course of its business, re-insured one-third of its risk as guarantor of the company's debentures as to 30,000*l.* with the Law Accident Insurance Society, Limited (called hereafter the Law Accident), and as to 3333*l.* 6*s.* 8*d.* with another small insurance company, and regularly paid the re-insuring companies their full proportion of the premiums. The terms of this re-insurance were embodied in a memorandum, called a "putting on slip," which was sent by the society to the Law Accident in accordance with a treaty or contract of re-insurance subsisting between them.

In June, 1901, Godson acquired by purchase the whole of the debenture issue of the company, but neither he nor the original allottees of the debentures had at that time any knowledge or notice of the re-insurances effected by the society.

In 1908 the company went into voluntary liquidation, and the society, under the powers of the trust deed, appointed one Stephens receiver of the property of the company. In September, 1908, Godson gave the society due notice of the company's default. In 1909 the society went into liquidation and two liquidators were appointed, who continued Stephens receiver of the company, and he continued to carry on the business of the company.

In July, 1910, a scheme of arrangement in the liquidation of the society was sanctioned by the Court. A clause of the scheme

provided that so long as the debentures of the company were held by a sole holder the liquidators of the society would not sell or offer for sale the property comprised in the debentures in lots or appoint a receiver of the property in the place of Stephens without either the consent in writing of the said holder or the sanction of the Court to be obtained on notice to such holder.

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—

The amount secured by the debentures was reduced from time to time by sales and payments from a sinking fund to 94,400*l.*, and in January, 1913, Godson lodged a proof against the society under their guarantee. In this proof he valued his securities at 65,000*l.* and claimed to prove for 29,400*l.*, the balance of the principal, and for 3306*l.* 11*s.* 7*d.* for arrears of interest to date, and this proof was eventually accepted by the liquidators in January, 1914. Subsequently Godson claimed to be entitled to the benefit of all re-insurances effected by the society in connection with the debentures of the company as against the general creditors of the society, and took out a summons to determine the matter.

*Martelli, K.C.*, and *A. Adams*, for the summons. The debentures, the trust deed, and the contracts of insurance and re-insurance in this case are practically the same as those in the *Liverpool Mortgage Insurance Co.'s Case* (1), and your Lordship there held on the authority of *In re Richardson* (2) that the contract between the society and the company was a contract of limited indemnity and that the company were only liable to pay the liquidators their proper proportion of the dividend actually paid by the liquidators to the debenture-holders, and that any sum the liquidators received above the dividends they paid was held by them in trust for the debenture-holders, and your Lordship also threw out the suggestion that the society might recover or be compelled to recover the whole amount for the benefit of the debenture-holders, but declined to decide it as the matter was not before you. The Court of Appeal (3) reversed your Lordship's decision on the first point and held that, whether the contract was a contract of re-insurance or of indemnity, the

(1) [1913] 2 Ch. 604.

(2) [1911] 2 K. B. 705.

(3) [1914] 2 Ch. 617.

NEVILLE J. company were liable to pay the whole of the loss re-insured against, but the other points in your Lordship's judgment were not argued nor decided, nor was *In re Richardson* (1) overruled.

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The only question before the Court of Appeal was, what could the liquidators recover from the re-insurers? Here the sole question is whether the liquidators will hold the whole of the sum payable by the Law Accident and the other re-insuring company for the benefit of the creditors of the society generally or for Godson. A trustee cannot make a profit out of his trusteeship: *Ex parte Andrews* (2); *In re Richardson*. (3) Here the society were trustees for the debenture-holders under the trust deed and guaranteed the debentures, and their only insurable interest in the property was as trustees. If they apply the re-insurance moneys as part of their general assets and only pay a dividend in respect of the debentures they will be making a profit out of their trusteeship. It is submitted that the contract between the society and the re-insuring companies is really a contract of indemnity and will not be fulfilled unless the whole of the re-insurance money is applied in discharge of the loss on the debentures.

*Maugham, K.C., and W. A. Greene, for the liquidators and the Law Accident Society, were not called upon.*

NEVILLE J. In a contract of indemnity, and I do not see any distinction between an express contract for indemnity and an implied contract resulting from the relations of the parties, the doctrine of law was that the person who was indemnified, whom I will call for shortness the indemnified, could only sue the indemnifier under the indemnity when he had actually discharged the debt. In other words he had to plead payment in an action on the indemnity. That relief was obviously in some cases insufficient, as is pointed out in the *Liverpool Mortgage Insurance Co.'s Case* (4) both in the Court below and in the Court of Appeal, and the result was the introduction of equitable relief which consisted in granting to the indemnified a right against his

(1) [1911] 2 K. B. 705.

(2) (1816) 2 Rose, 410.

(3) [1911] 2 K. B. 711.

(4) [1913] 2 Ch. 604; on appeal [1914] 2 Ch. 617.

indemnifier to have the obligation discharged, and this was done in a suit in equity either by the direct payment from the indemnifier to the creditor or by the provision or appropriation of a fund to meet the liability. That exhausted the right under the contract of indemnity subject to this, that it appears from *Ashdown v. Ingamells* (1) and what Scrutton J. says in his judgment in the Court of Appeal that in law bankruptcy in an action on an indemnity was equivalent to payment. I do not see any distinction between the case of the creditor actually making a proof in the bankruptcy and having the right to make the proof, because what discharges the obligation of the debtor is the bankruptcy and not the proof of the creditor in the bankruptcy. That was sufficient to dispose of the case and there was no necessity to resort to equitable relief of any kind. It was the simple question of what was the legal right of the indemnified upon a contract of indemnity. I can draw no distinction between the liquidation of an insolvent company and a bankruptcy; in both cases the debts owing to the creditor seem to me to be discharged. I am not sure whether the Court of Appeal purported to decide the case upon that ground, but what they undoubtedly did decide was this, that the particular contract they had before them, and probably that would apply to that class of contracts, was a contract to pay a defined sum on a particular contingency, and that when that contingency happened the right to recover the amount arose, and that that was quite independent of any application of the money or anything but the right of the contractor under the contract that he had entered into; and here again I think from that point of view that was enough to decide the case. Upon which of those grounds the Court of Appeal proceeded, I do not think is very material, because either of them would have been sufficient. They say, first of all, "under this particular contract you have got a contract to pay on a contingency, and the contingency having happened you must pay." From the other point of view they say "you have got a contract of indemnity, the debt has been discharged by operation of law, and consequently you are entitled to recover." In either case it is the assertion of a legal right and there is no necessity

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—

(1) (1880) 5 Ex. D. 280.



NEVILLE J. to resort to equitable relief at all. On the best consideration I  
1914 can give to the judgments in the Court of Appeal, that I think  
LAW is the outcome of the judgments and decides the present case,  
GUARANTEE subject to one point. It might be that although the society were  
TRUST AND entitled to recover the money and the payer of the money had no  
ACCIDENT right to have anything to say with regard to its application, still  
SOCIETY, when it came into their hands there might be some relation  
*In re.* between themselves and the debenture-holders which would make  
GODSON'S them trustees of the money for the debenture-holders, so that  
CLAIM. instead of dealing with it as part of the general assets it would have  
to be applied for the benefit of the cestuis que trust. But in my  
opinion there was here no such relation between the parties.  
True it is that the society were the trustees for the debenture-  
holders of the mortgaged property, but they also entered into a  
guarantee with the debenture-holders for payment to them by  
the company issuing the debentures, and it seems to me that  
their relation in that respect was totally independent of their  
relation of trustees under the debenture trust deed in that it  
involved no fiduciary relation to the debenture-holders. Con-  
sequently the society are in this case entitled to recover the  
money from their re-insurers and to apply it to their own use as  
part of their general assets, and the holder of the debentures  
has no special claim on it.

Solicitors: *Cree & Son; Frere, Cholmeley & Co.*

H. L. F.

*In re* WHITEFORD.  
WHITEFORD *v.* WHITEFORD.

NEVILLE J.

1914

Dec. 2, 3.

[1914 W. 1979.]

*Marriage Settlement—Power of Appointment amongst Issue—Appointment of Income for Benefit of Lunatic Child — Rule against Perpetuities — Contingent Interest.*

Under her marriage settlement a tenant for life had, in the events which happened, a power of appointment by will in favour of her five sons, one of whom was of unsound mind. By her will she appointed that after her death two fifths of the settled funds should be held in trust, until the lunatic should die or two medical men should certify him capable of managing his affairs, to apply the whole or so much of the income of the two fifths as should be required to make up the total income from all sources of the lunatic to 200*l.* per annum in such manner as the trustees should in their discretion think fit for the maintenance of the lunatic, and to divide the residue (if any) of such income equally between her other four sons; and then there followed gifts over. After the death of the tenant for life the question arose whether the trusts of the income of the two fifths infringed the rule against perpetuities:—

*Held*, that the trusts of the income of the two fifths for the benefit of the lunatic were void for remoteness, for the interest which the lunatic and his brothers took in such income was not vested, but contingent every year on the happening of events.

ADJOURNED SUMMONS.

By deed dated April 3, 1866, being the settlement executed on the marriage of Mr. and Mrs. Whiteford, real and personal property was settled upon trusts, in the events which happened, for Mr. Whiteford for life, and after his death for Mrs. Whiteford for life, and after her death “in trust for all or such one or more exclusively of the other or others of the issue of the said intended marriage at such age or time or respective ages or times if more than one in such shares and with such future and other trusts for the benefit of such issue or some or one of them and with such provisions for their respective maintenance education or advancement and in such manner” as Mr. and Mrs. Whiteford should by deed jointly appoint; and in default of such appointment and so far as no such appointment should extend then as the survivor

NEVILLE J. of them should in like manner or by will or codicil appoint, and  
1914 in default of any such appointment and so far as no such appoint-  
WHITEFORD, ment should extend in trust for all the children of the said  
*In re.* intended marriage who being sons or a son should attain the age  
WHITEFORD of twenty-one years or being daughters or a daughter should  
*v.* attain that age or marry. The settlement contained the usual  
WHITEFORD. hotchpot clause.

There was issue of this marriage seven children and no more, namely, five sons and two daughters. All the sons attained twenty-one, but one of them was of unsound mind. The two daughters died in infancy. In 1883 Mr. Whiteford died without having exercised the joint power of appointment vested in him and his wife.

In 1903 Mrs. Whiteford died, having by her will, dated May 15, 1897, and made in exercise of the aforesaid power, appointed that the trustees or trustee for the time being of the said settlement should with all convenient speed after her death pay two equal fifth parts of the funds subject to the trusts of the said settlement to her sons Charles Whiteford and Eric Whiteford to be held by them upon the trusts thereafter declared, and "subject thereto" she appointed that all the trust premises under her said marriage settlement over which she had any power of appointment should from and after her decease be held in trust (in the events which happened) for her four sons Charles Whiteford, Eric Whiteford, Basil Whiteford, and Frank Whiteford in equal shares. And she directed that Charles Whiteford and Eric Whiteford should stand possessed of the two fifth shares of the said funds so bequeathed to them as aforesaid upon trust until her son "Walter Whiteford who at present suffers from illness which incapacitates him from mental exertion shall die or shall be certified by two duly qualified medical men by writing under their hands to be capable of managing his own affairs to apply the whole or so much of the income of such two fifth shares as shall be required for making up the total income from all sources of the said Walter Whiteford to the sum of 200*l.* per annum in such manner as the said Charles Whiteford and Eric Whiteford shall in their uncontrolled discretion think proper and most beneficial for the maintenance support and comfort of the said Walter Whiteford

during his life and to divide the residue (if any) of such income equally between my other four sons. And from and after the signature of such certificate as aforesaid I direct that the said Charles Whiteford and Eric Whiteford shall stand possessed of one of such two fifth shares upon trust for the said Walter Whiteford and as to the remaining one fifth part upon trust " for her other four sons as therein mentioned; and she directed that, from and after the death of Walter Whiteford without such certificate having been signed, the said Charles Whiteford and Eric Whiteford should stand possessed of such two fifth shares upon trust for her other four sons as therein mentioned.

For some years after the death of Mrs. Whiteford the income of the two fifths was applied by Charles and Eric Whiteford for the benefit of their brother Walter, but eventually proceedings in lunacy were instituted with respect to Walter Whiteford, and his brother Charles Whiteford was appointed committee of his estate. A question then arose in the lunacy whether the appointment made by the will of Mrs. Whiteford of the two fifths of the settlement trust funds for the benefit of Walter Whiteford was invalid on the ground of remoteness, and the settlement trustees took out a summons to determine the matter.

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WHITEFORD,  
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WHITEFORD  
*v.*  
WHITEFORD.

*Baden Fuller*, for the plaintiffs.

*Jenkins, K.C.*, and *T. T. Methold*, for the Official Solicitor representing Walter Whiteford. For the purposes of the rule against perpetuities Mrs. Whiteford's was the life in being under the marriage settlement, and we admit that the gift over of the corpus of the two fifths after the life of Walter or the giving of the medical certificate, which are events that may happen more than twenty-one years after Mrs. Whiteford's death, is void for remoteness, and that the terms of the gift in the first appointment having regard to the words "subject thereto" are wide enough to sweep in anything that fails by perpetuity or otherwise. The only question is as to the dealing under the power of appointment with the income of the two fifths during the life of Walter. It is submitted that that dealing limited as it is to the life of Walter or until he shall obtain a medical certificate is, having regard to the wide terms of the power, perfectly good and does



NEVILLE J. not offend any rule against perpetuities. His sanity must come, if it comes at all, during his lifetime. Under the appointment  
 1914  
 WHITEFORD, Walter and his brothers take between them a vested interest  
*In re.* in the whole of the income during his life or until an event in  
 WHITEFORD his life: *In re Thompson* (1); *Wainwright v. Miller* (2); *Boughton*  
*v.* *James*. (3) It is clear that if the trust had been a discretionary  
 WHITEFORD power to apply the whole of the income for Walter's benefit during  
 his life or until sanity he would have had a vested interest, and  
 if he had become of sound mind afterwards without obtaining a  
 certificate and had become bankrupt, his trustee in bankruptcy  
 would have been entitled to the income: *Green v. Spicer*. (4)  
 What difference does it make because the amount he may receive  
 varies from time to time, and that the whole or a part may go to  
 him in different years? The fact that he has not obtained or  
 cannot obtain the certificate cannot avoid the gift. The law of  
 perpetuities has never yet turned on variations in the amount  
 of income, but the only question has been whether the object  
 takes a vested interest. It is submitted that the true view of this  
 gift is that Walter and his brothers take between them a vested  
 interest in the whole of the income, the only thing being that  
 the amount payable to each varies in different years. It has  
 also been suggested that the trusts of the two fifths offend the  
 rule against the delegation of a power. But where the exigencies  
 of business render it necessary, the agent originally instructed  
 may appoint a sub-agent to carry out the instructions of the  
 principal: *De Bussche v. Alt*. (5)

*Peterson, K.C.*, and *J. G. Wood*, for the four brothers. This  
 is a gift of income to a class consisting of five persons, and you  
 cannot say at the death of the appointor or at any time after  
 within twenty-one years what is the minimum share of the  
 income to which any one of them may be entitled in any year.  
*In re Thompson* (1) is distinguishable. There the gift was to a  
 class on attaining twenty-five, and at the death of the appointor  
 all the appointees had attained twenty-five and took immediate  
 vested interests. Here no part of the income is vested in any-

(1) [1906] 2 Ch. 199.

(3) (1844) 1 Coll. 26, 46.

(2) [1897] 2 Ch. 255, 259.

(4) (1830) 1 Russ. &amp; My. 395.

(5) (1878) 8 Ch. D. 286, 310.

body, but the gift is contingent on events which may not happen within twenty-one years of the death of the appointor, and you cannot predicate beforehand for any year who is the person entitled to the income. In each year Walter may have the whole or none or only a part of the income, and the fact that the income is given whilst he is insane is immaterial. It is quite impossible to say what his share (if any) and that of his brothers is. It is not a vested but a contingent interest which infringes the rule against perpetuities: *Pearks v. Moseley* (1); *In re Ashforth*. (2) Then as to the delegation of the power —

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WHITEFORD,  
*In re.*  
WHITEFORD  
*v.*  
WHITEFORD.

[NEVILLE J. I do not require to hear you on that point.]

*T. T. Methold* in reply.

NEVILLE J. The question in this case arises upon the execution by a tenant for life of a power of appointment contained in a settlement, and the persons who may take, having regard to the rule against perpetuities, must get a vested interest within twenty-one years from the appointor's death. The words of the power are these. [His Lordship read the clause of the settlement stated above, and continued:] That is the power which was exercised by Mrs. Whiteford's will in this way—referring only to the words which are material—trustees are to hold two fifth parts of the funds subject to the trusts of the marriage settlement and to apply the whole or so much of the income of such two fifths “as shall be required for making up the total income from all sources of the said Walter Whiteford to the sum of 200*l.* per annum in such manner as the said” trustees “shall in their uncontrolled discretion think proper and most beneficial for the maintenance support and comfort of the said Walter Whiteford during his life and to divide the residue (if any) of such income equally between my other four sons.” That is the appointment I have to consider. It is obviously an appointment of an interest among five persons, and the question I have to determine is: Is it a vested interest or is it a contingent interest? On the one side it is argued that it depends upon the happening of a contingency. On the other side it is argued that it is a vested interest from the death of the appointor, although the amount

(1) (1880) 5 App. Cas. 714, 722.

(2) [1905] 1 Ch. 535.

NEVILLE J. of income to be received by any one of the five could only be  
1914 ascertained from year to year and might have to be ascertained  
WHITEFORD, after the expiration of twenty-one years. I think the question  
*In re.* really is whether you can have a vested interest depending in  
WHITEFORD whole or in part upon the happening of a particular event. It  
*v.* seems to me that to say you can is to state what is a contradiction  
WHITEFORD. in terms, because the thing cannot be both vested and con-  
tingent. The contingency really is the amount of the yearly  
income of the appointee, which may involve the payment of the  
whole income of the two fifths in one year and none of it in the  
next. It seems to me that is a contingency affecting the pay-  
ment to the other four takers because as one share is reduced  
the other is increased by the same amount, and consequently  
the other four sons may as well as the first appointee get either  
something or nothing in each year. It is an interest of a  
peculiar kind, but it seems to me to be essentially a contingent  
gift, and a gift of which it is impossible to say that it vested in  
any particular person. It follows that the trusts of these two  
fifth shares of the trust funds under the settlement fail.

Solicitors: *Torr & Co., for Whiteford & Bennett, Plymouth;*  
*the Official Solicitor.*

H. L. F.

[LIVERPOOL DISTRICT REGISTRY.]

EVE J.

*In re* RICHARDSON.

1914

RICHARDSON *v.* RICHARDSON.

Dec. 10.

[1914 R. 242.]

*Will—Construction—Legacies for Life—Capital to fall into Residue—Deficiency of Estate—Administration—Legatees treated as Annuitants—Form of Order.*

Testator (after giving pecuniary legacies which had priority and were provided for) gave the residue of his property upon trust to pay the income of eight specified sums to eight persons respectively for life, each capital sum on the death of each of four of the legatees to fall into the ultimate residue, the other four sums being settled. The estate was insufficient to provide the eight sums:—

*Held*, that, on the authority of *Arnold v. Arnold* (1835) 2 My. & K. 365, 374, the four legatees, the capital of whose legacies was at their respective deaths to fall into residue, ought to be treated as annuitants; that, in accordance with the rule in *In re Cottrell* [1910] 1 Ch. 402, their annuities and the other four legacies ought to be put on a level and abate rateably; and that, accordingly, the annuities must be valued as at a year from the testator's death and the four amounts so ascertained must be treated as pecuniary legacies, and each of those amounts and of the other four legacies must bear its rateable proportion of the total abatement.

## ADJOURNED SUMMONS.

Charles Nicol Richardson by his will, dated March 31, 1911, appointed executors and trustees thereof and, after giving 40*l.* upon trust for the upkeep of his grave and tombstone, bequeathed pecuniary legacies amounting to 10,350*l.*, and after a specific devise of a grave at Ilford and certain bequests of pictures, clothing, furniture, and effects, continued: "All the rest residue and remainder of my property of every description both real and personal whatsoever and wheresoever I give devise and bequeath unto my said trustees . . . upon trust in the first place to pay my just debts funeral and testamentary expenses and then upon trust as to 2500*l.* to pay the income thereof to . . . William Hartley Richardson for . . . his life and upon the death of the said William Hartley Richardson upon trust to pay the said sum of 2500*l.* to the . . . Liverpool Merchants Guild . . .



EVE J. 1914 And as to 1500*l.* upon trust to pay the income to arise there-  
 RICHARDSON, from unto my sister Kate Richardson for . . . . her life but . . . .  
*In re.* conditionally upon my said sister assigning to my said trustees  
 RICHARDSON all her . . . . interest . . . . under the will of the late Mercey  
*v.* Richardson . . . . and on the death of the said Kate Richardson  
 RICHARDSON, then upon the trust hereinafter declared concerning the residue  
 of my trust estate And as to 600*l.* upon trust to pay the income  
 to arise therefrom to . . . . Walter Richardson for . . . . his  
 life and on his death upon the trust hereinafter declared con-  
 cerning the residue of my estate And as to 800*l.* upon trust to  
 pay the income to arise therefrom to . . . . Sarah Ann Richard-  
 son for . . . . her life and on her death upon the trust herein-  
 after declared concerning the residue of my trust estate And as  
 to 2000*l.* upon trust to pay the income to arise therefrom to  
 . . . . Percy Morgan Richardson for . . . . his life and on his  
 death without leaving a widow or issue him surviving then upon  
 the trust hereinafter declared concerning the residue of my trust  
 estate but if the said Percy Morgan Richardson should die  
 leaving a widow or issue him surviving then upon trust" as  
 thereby settled "And as to 2500*l.* upon trust to pay the income  
 to arise therefrom to . . . . Ada Mary Richardson for . . . .  
 her life and on her death upon the trust hereinafter declared  
 concerning the residue of my trust estate And as to 500*l.* upon  
 trust to pay the income to arise therefrom to . . . . Eliza  
 Matthews . . . . for . . . . her life and upon the death of the  
 said Eliza Matthews upon trust to pay the said sum of 500*l.* to  
 the Liverpool Merchants Guild . . . . And as to 100*l.* to pay  
 the income to arise therefrom to . . . . Hannah Sherborn for  
 . . . . her life and after her death to pay the said sum of 100*l.*  
 to her sons . . . . or to the survivor of them . . . . And as to  
 all the residue of my trust estate upon trust for . . . . William  
 Harold Richardson and Ernest Sadler Richardson and . . . .  
 Marion Mercey Roberts in equal shares absolutely."

The testator died on March 5, 1913, and his will was duly proved.

On February 7, 1914, the executors and trustees commenced this action for the determination of certain questions arising in the administration of the estate.

On November 16, 1914, an order was made that the absolute pecuniary legacies bequeathed before the gift, devise and bequest of all the rest, residue, and remainder of the testator's property had priority over the sums of 2500*l.*, 1500*l.*, 600*l.*, 800*l.*, 2000*l.*, 2500*l.*, 500*l.*, and 100*l.* directed to be held in trust. And it was declared that the sum of 1500*l.* directed to be held in trust for Kate Richardson for life had no priority over the other seven sums directed to be held in trust. It was also declared that the ultimate residuary legatees were not entitled to any part of the testator's estate until the eight sums should have been fully satisfied.

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The estate was not sufficient for setting aside the eight sums after providing for the pecuniary legacies having priority.

The summons now came on for the determination of the question how the deficiency ought to be apportioned between the trust legacies.

*E. Ackroyd*, for the plaintiffs.

*Courthope Wilson*, for the ultimate residuary legatees. The eight trust legacies are ordinary settled legacies and the capital sums must abate equally.

*J. Rutherford*, for the Liverpool Merchants Guild. These legatees will in any case get their legacies in the end, and are content to wait for the life interests to fall in in ordinary course.

*R. W. Baxter*, for Sarah Ann Richardson and Ada Mary Richardson. The legatees for life, the capital of whose legacies is to fall into residue, must be treated as annuitants: *Arnold v. Arnold*. (1) For example, Ada's life interest in 2500*l.* should be treated, at 4 per cent., as equivalent to an annuity of 100*l.*; that annuity should be valued; the amount of the valuation should be treated as a pecuniary legacy; from that should be deducted the sum necessary for proportionate abatement; and the capital of the reduced legacy so ascertained should be paid over to Ada, or invested on Government security: *In re Cottrell*. (2) That would be a convenient course, and would be rateable.

*Maugham, K.C.*, and *Whitmore Richards*, for Kate (who was

(1) 2 My. & K. 365, 374.

(2) [1910] 1 Ch. 402.

EVE J. willing to comply with the condition attached to her legacy). If  
 1914 there is a deficiency, there should be a rateable abatement, and  
 RICHARDSON, the only logical course is to ascertain capital values and treat  
*In re.* those as pecuniary legacies. But it is not clear that there need  
 RICHARDSON be any abatement, if, instead of Government annuities, annuities  
*v.* are bought at lower prices at some first-rate insurance office.  
 RICHARDSON. Once admit there is a deficiency, the case is very like *Arnold v.*  
*Arnold.* (1)

*Courthope Wilson* in reply. *Arnold v. Arnold* (1) has been entirely misread. It does not at all decide that a tenant for life of a fund to fall into residue is an annuitant, which was not the point of the case. If those legacies were annuities, the residuary legatees would have nothing to say. But they are not annuities, but interests in the income, whatever it may be, of fixed sums. It cannot be thought the testator meant the residuary legatees to be left with nothing at all. Turner L.J. states the general rule in *Croly v. Weld.* (2)

EVE J. The testator by his will bequeathed several pecuniary legacies, which I held on a former occasion were entitled to priority. These having all been provided for, I have now to deal with the residuary estate, which is given to trustees upon trust thereout to set aside and invest certain specified sums and to pay the income to various legatees for life and on their respective deaths to pay the capital to other legatees, except that in four instances the testator declared that on the death of the life tenant the sum set aside for his or her benefit was to fall into residue. The ultimate residue is given to three named persons. The sums so to be set aside out of residue amount to 10,500*l.*, and unfortunately the residue falls short of that amount by a sum of from 2000*l.* to 3000*l.* The question now is how ought the deficiency to be apportioned among the various persons interested in the sums making up the 10,500*l.*

It has been argued on behalf of those interested in the ultimate residue, and by Mr. Rutherford who appears for a charity entitled to one of the appropriated sums subject to a preceding life interest, that the sums making up the 10,500*l.* are all settled legacies and

(1) 2 My. & K. 365, 374.

(2) (1853) 3 D. M. & G. 993, 995.

ought to abate rateably, and that, as the life interests in the four sums directed to fall into residue determine, these four sums amounting together to 5400*l.* will respectively be available to mitigate, and possibly make good, for the benefit of life tenants and remaindermen the present deficiency. I think it is inaccurate to speak of these last sums as settled legacies—they are appropriated sums the income of which is disposed of during the lives of the legatees but of which the capital is left to pass under the residuary bequest—and the legatees interested in these sums as life tenants protest against any course of administration calculated to give them less than the testator contemplated and intended they should have. Accordingly they claim that the right thing to do is to regard them as annuitants entitled to annuities equivalent in amount to the income of the respective sums directed to be appropriated for their benefit, and, the estate being insufficient to keep down the annuities, to treat each of them as a pecuniary legatee of a capital sum equal to the value of his or her annuity at the expiry of one year from the testator's death. It is admitted that, if once the legatees in question can be regarded as annuitants, the result they contend for must follow.

I think the case of *Arnold v. Arnold* (1) is a sufficient authority for holding that legatees whose legacies are life interests in sums directed to be appropriated for their benefit are really annuitants, and, where the estate is insufficient to pay legacies and to keep down the annuities in full, the rule adopted by the Court for the purpose of ascertaining the proper proportionate abatement of legacies and annuities respectively is to put all on the same level and to convert the annuities into pecuniary legacies. To effect this, each annuity is valued as at the date when it would have been payable had it taken the form of a pecuniary legacy, and the value so ascertained is treated as a pecuniary legacy liable to abate rateably with the other legacies. The rule was stated and applied by Warrington J. in *In re Cottrell* (2) and in my opinion is applicable and ought to be applied here.

I think, seeing that the rate of interest which has been paid on account to some of the legatees is 4 per cent., it will not be unreasonable to treat the appropriated sums as capable of

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(1) 2 My. &amp; K. 365, 374.

(2) [1910] 1 Ch. 402.



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producing income at that rate, and to calculate the annuities on that footing. Each of the annuities so arrived at will then be valued according to the Government tables as at the expiry of one year from the testator's death, and the four annuitants will be treated as pecuniary legatees for the respective amounts so ascertained, and each of these amounts will bear its rateable proportion of the abatement which has to be made in common with the other legacies making up the 10,500*l.* If ultimately, owing to the failure of issue or from any other cause, the bequest in remainder of the 2000*l.* in which Mr. Percy Morgan Richardson has the first life interest fails, that 2000*l.* will fall to be apportioned among the legatees by way of addition to the distribution now about to be made.

Solicitors : *H. G. C. Day, Liverpool ; Whitley & Co., Liverpool ; Crowders, Vizard, Oldham & Co., for C. H. Garrett, Caterham Valley.*

NOTE.—The order as passed and entered was as follows (omitting immaterial parts) : The further hearing of the originating summons dated the 7th day of February 1914 which was adjourned . . . coming on . . . to be heard . . . and upon hearing counsel . . . and upon reading the . . . order of the 16th day of March 1914 and the evidence therein referred to . . . And it appearing that the estate of the said testator Charles Nicol Richardson (hereinafter called the testator) remaining after payment of the testator's debts and funeral expenses and the costs charges and expenses of the administration of the testator's estate and after payment of the legacies which under the said order of the 16th day of March 1914 or otherwise have priority and the interest on such legacies and after making provision for the expenses of burial of the testator's brother . . . and his sister . . . (hereinafter called the net estate) is insufficient to provide the sums of 2500*l.*, 1500*l.*, 600*l.*, 800*l.*, 2000*l.*, 2500*l.*, 500*l.* and 100*l.* by the testator's will directed to be held upon trust to pay the income thereof respectively to the plaintiff William Hartley Richardson the defendant Kate Richardson Walter Richardson the defendant Sarah Ann Richardson Percy Morgan Richardson the defendant Ada Mary Richardson Eliza Matthews (since deceased) and Hannah Sherborn during their respective lives to the full amount thereof This Court doth declare that on the true construction of the testator's will and in the events which have happened such last mentioned legacies ought to abate proportionately And it is declared that for the purposes of such abatement the interests of the defendant Kate Richardson the said Walter Richardson and the defendants Sarah Ann Richardson and Ada Mary Richardson in the income of the said capital sums of 1500*l.* 600*l.* 800*l.* and 2500*l.* respectively ought to be treated as annuities of 60*l.* 24*l.* 32*l.* and 100*l.* respectively (being the

equivalent of 4*l.* per cent. per annum on such capital sums respectively) during their respective lives commencing on the expiration of one year from the testator's death and that the value of such respective interests according to the sums required as at the expiration of one year from the testator's death to purchase Government annuities of 60*l.* 24*l.* 32*l.* and 100*l.* respectively during the respective lives of the defendant Kate Richardson the said Walter Richardson and the defendants Sarah Ann Richardson and Ada Mary Richardson ought to be ascertained And it is declared that for the purposes of such abatement interest at the rate of 4*l.* per cent. per annum from the expiration of one year from the testator's death down to the date of apportionment of the net estate ought to be computed on and added to the said sums of 2500*l.* 2000*l.* 500*l.* and 100*l.* by the testator's will directed to be held upon trust to pay the income thereof respectively to the plaintiff William Hartley Richardson the said Percy Morgan Richardson Eliza Matthews and Hannah Sherborn during their respective lives and on the values ascertained as aforesaid of the said respective interests of the defendant Kate Richardson the said Walter Richardson and the defendants Sarah Ann Richardson and Ada Mary Richardson and that the net estate ought to be apportioned among the said last mentioned sums and the values so ascertained as aforesaid with the interest thereon rateably according to their respective amounts regard being had in such apportionment to all sums of money which have been received by the respective legatees on account of their respective interests And it is declared that the legacy duty and settlement estate duty (if any) payable in respect of the sums so apportioned or in respect of any interest therein ought to be borne by the respective sums and interests in respect of which the same is payable And it is declared that the respective amounts (less any duty payable in respect thereof) so apportioned in respect of the said respective interests of the defendant Kate Richardson and the said Walter Richardson and the defendants Sarah Ann Richardson and Ada Mary Richardson ought at their option either to be laid out in the purchase of Government annuities during their respective lives or to be paid to them respectively or satisfied by the transfer to them respectively of investments equal in value on the said date of apportionment to such respective amounts And the defendant Kate Richardson by her counsel undertaking within a reasonable time to execute an assignment to the plaintiffs . . . the trustees of the testator's will in fulfilment of the condition imposed on her by the testator's will This Court doth order that the plaintiffs be at liberty to apply in chambers in case the defendant Kate Richardson shall not fulfil such undertaking within a reasonable time and that on such application it shall not be necessary to give notice thereof to any of the defendants other than the defendant Kate Richardson And it is ordered that it be referred to one of the district registrars at Liverpool to tax the costs of all parties of this application as between solicitor and client from the foot of the last taxation in this matter and the plaintiffs as the trustees of the testator's will are to be at liberty to retain and pay the said costs as taxed out of the testator's estate And any of the parties are to be at liberty to apply in chambers touching the carrying out of the said abatement and generally.

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## SARGANT J. HAILSHAM CATTLE MARKET COMPANY v. TOLMAN.

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[1914 H. 1813.]

Nov. 16, 17,  
27.

*Market—Statutory Market—Disturbance—Exception in case of Sales “on any land or in any building belonging” to a Seller “or in his occupation”—Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 13.*

By a private Act, passed in 1871, incorporating certain statutes, including the Markets and Fairs Clauses Act, 1847 (except where expressly varied by the private Act), the plaintiffs were incorporated, the limits of operation of the Act were defined, and the company were empowered to continue, establish, and maintain a market for the sale of certain animals. By s. 42 every person who should, on the days appointed for holding markets, within the limits of the Act sell or expose for sale at any place within those limits, “except on any land or in any building belonging to him or in his occupation,” any animals, in respect of which tolls were by the Act authorized to be taken, should forfeit and pay to the company any sum not exceeding forty shillings, unless he should have paid the tolls authorized. By s. 13 of the Act of 1847, after the market place of a market under a special Act is opened for public use, every person other than a licensed hawker who sells or exposes for sale in any place within the prescribed limits “except in his own dwelling-place or shop” any articles in respect of which tolls are by the special Act authorized to be taken in the market is for every offence liable to a penalty not exceeding forty shillings. The plaintiffs’ markets were held on every alternate Wednesday, and sales took place there both by auctioneers and through private bargains by the frequenters of the market. The defendant acquired and occupied land within the limits of the private Act, on which he erected buildings which were used for animals in respect of which tolls were payable when sold in the plaintiffs’ market, and for selling purposes. In one building there were a ring for showing the cattle and a rostrum, and in the open there were pens for the animals. On these premises the defendant held auction sales of animals every third Tuesday. The sales were attended by several persons who attended the plaintiffs’ market, but there was no private bargaining among those who attended the sales:—

*Held*, (1.) that s. 13 of the Act of 1847 was so varied by s. 42 of the private Act (a) that the exemption under the former in respect of sales in a shop was extended to sales on any land or building belonging to or occupied by the seller of tollable animals, (b) that the prohibition applicable to every day was so limited as to apply to market days only, and (c) that the exemption as regarded sales on land or in a building so owned or occupied freed the seller not only on market days but on other days; (2.) that, although the plaintiffs would have been entitled to an injunction to restrain the defendant’s proceedings as a disturbance if the

plaintiffs' market had been an ordinary or charter one, and although the owners of a statutory market were in as favourable a position in this respect, apart from any contrary express or implied provision in the statute, the defendant's acts were only selling at a place within the exemption in s. 42 of the private Act; (3.) that that section and s. 13 of the Act of 1847 exempted not only from pecuniary penalties, but also from any general prohibition against the excepted acts which would otherwise be inferred from the creation of a statutory market, and, therefore, (4.) that the plaintiffs' claim for an injunction failed.

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In the case of a new statutory franchise of market an intention may more readily be implied to negative or limit the rights of monopoly that would otherwise attach to the franchise than in the case where a statute continues an existing market.

*Elwes v. Payne* (1879) 12 Ch. D. 468 distinguished.

*Abergavenny Improvement Commissioners v. Straker* (1889) 42 Ch. D. 83 followed.

*Birmingham Corporation v. Foster* (1894) 70 L. T. 371 and *Haynes v. Ford* [1911] 2 Ch. 237 explained.

By a private Act, the Hailsham Cattle Market Act, 1871 (34 & 35 Vict. c. 1.), after reciting that a company had been incorporated under the Companies Act, 1862, for the purpose of providing, and had provided, a new cattle and live stock market at Hailsham by the name of The Hailsham Cattle Market Company, Limited, and that the company were willing and it was expedient that they should be empowered to continue and maintain the cattle market in the parish of Hailsham, in that Act described, under proper regulations and management, it was amongst other things enacted as follows:

By s. 2 of the Act various Consolidation Acts, including the Markets and Fairs Clauses Act, 1847, were (except where expressly varied by the private Act) incorporated with and formed part of the private Act. By s. 3 an extended meaning was given to the word "cattle" so as to include bulls, oxen, cows, heifers and calves, rams, wethers, ewes and lambs, and swine, and an extended meaning was also given to the word "horses." By certain other sections the plaintiff company were incorporated and the property of the limited company was vested in the plaintiff company, and provisions were made for the plaintiff company standing in all respects in the shoes of the limited company. By s. 39 the limits within which the private Act might be put into force were to be co-extensive with the parish of Hailsham except that portion of



SARGANT J. the parish which was within the liberty of Pevensey. By s. 40

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the company were empowered to continue, establish, and maintain a market for the sale of cattle and horses with all proper conveniences. Sect. 42 was as follows :

“Every person who shall on the days hereby appointed or to be appointed for holding markets within the limits of this Act sell, let, or expose for sale or letting, at any place within the limits of this Act, except on any land or in any building belonging to him or in his occupation, any horses, cattle, sheep, pigs, or other live stock in respect of which tolls are by this Act authorised to be taken, shall forfeit and pay to the Market Company any sum not exceeding forty shillings, unless he or they shall pay or have paid the tolls by this Act authorised to be taken.”

By s. 43 a market was to be held by the company on such week-days with one or two exceptions and within such hours as the company should from time to time appoint, provided that until the company should otherwise appoint the market should be held on the day on which it was then held. And by s. 45 the company were empowered to take tolls from persons bringing any cattle or horses into the market for sale or exhibition.

Sect. 13 of the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), is as follows : “After the market place is opened for public use every person other than a licensed hawkers who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling -place or shop, any articles in respect of which tolls are by the special Act authorized to be taken in the market, shall for every such offence be liable to a penalty not exceeding forty shillings.”

Prior to the passing of the private Act the market at Hailsham had been held on alternate Wednesdays. This practice was continued by the plaintiff company under the private Act without variation down to the present time. The market accommodation there was sufficient. Sales took place there through the agency of two auctioneers as well as by private bargain amongst those frequenting the market.

The defendant agreed quite early in 1914 to buy some land lying in the parish of Hailsham, outside the liberty of Pevensey, and adjoining the Polegate station of the London, Brighton and

South Coast Railway; and in April last this land was conveyed to him. After the agreement and prior to the conveyance he was let into possession of the land. He had since erected three corrugated iron covered buildings on the land, of which one was used for fat stock, the second for cows with calves, and the third for selling purposes. In the third building were a ring in which the cattle were exhibited at the time of sale and a rostrum. Besides these buildings there were also iron pens in the open for show cattle and for sheep and pigs. On these premises the defendant held auction sales every third Tuesday, so that once in six weeks his sale would be held on the day preceding the plaintiff company's market day. He advertised his sales in the local newspapers and in the course of doing so described the premises in the first instance as the Polegate Cattle Market, and he also sent round entry forms to farmers and other likely vendors. The sales at the defendant's premises were of a fairly extensive character and were attended by several at least of those who attended the plaintiff company's market.

There was no evidence, however, that any sales took place by private bargain between the frequenters of the sale or otherwise than through the medium of the auctions. The defendant was always present taking an active part in the proceedings, though a clerk of his was the actual auctioneer.

In the present action the plaintiff company claimed a declaration that they were entitled to the exclusive right of holding markets for the sale of cattle and horses and for such animals other than cattle and horses, and such commodities and things for which markets might be held and tolls taken under the powers conferred by the private Act within the parish of Hailsham (except the portion of the parish which was within the liberty of Pevensey); and an injunction to restrain the defendant, his servants and agents, from establishing a market at Polegate, or from using any premises within the part of the parish not within that liberty as a market, or permitting the same to be used in such a manner as to interfere with or prejudicially affect the rights of the plaintiffs to the said market as thereinbefore declared, and from advertising or causing to be advertised any portion of those premises as a market or as a place used or to be used in any such

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SARGANT J. manner as to interfere with or prejudicially affect the rights of the plaintiffs. They also claimed damages.

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The action was tried on November 16 and 17, 1914.

*Martelli, K.C.*, and *W. A. Casson*, for the plaintiffs. Sect. 42 of our private Act supersedes altogether s. 13 of the Markets and Fairs Clauses Act, 1847. Both the sections deal with sales on a man's own premises, but not with common law disturbances. The remedies given by them are additional to, and not restrictive of, the plaintiffs' common law remedies. Sect. 42 of the private Act leaves the plaintiffs' common law rights and remedies unaffected as regards all days which are not market days, and also as regards market days except as expressly affected by the section. The section does not authorize an auctioneer to hold a market in derogation of our statutory market rights, and the private Act deals only with individual sales and not with the setting up of a rival market. Where a rival market is set up the common law affords us sufficient protection, and in such a case an injunction will be granted to restrain the sale, to any members of the public choosing to attend, of animals, the holding of markets of which is our statutory right: *Birmingham Corporation v. Foster*. (1) The corporation there had no stronger case than ours, for the prohibition in the special Act applied to every day. We have not failed to provide sufficient accommodation in our market, but if we had, that would be no answer to a claim for an injunction: *Great Eastern Ry. Co. v. Goldsmid*. (2) The holding of a rival market on different days from those on which an ancient market is held may be an interference with the rights of the owners of the latter: *Elwes v. Payne*. (3) Selling in a large hall by the owner thereof has been held to be not a sale within his "own dwelling-place or shop" within the meaning of s. 13 of the Act of 1847: *Fearon v. Mitchell*. (4) In order to be within the exception of a "shop" the place where the goods are sold must be really the seller's private shop, and not a merely different market: *Pope v. Whalley*. (5) Therefore, selling in sheds in a

(1) 70 L. T. 371.

(3) 12 Ch. D. 468.

(2) (1884) 9 App. Cas. 927.

(4) (1872) L. R. 7 Q. B. 690.

(5) (1865) 6 B. & S. 303.

large yard adjoining the seller's residence, with an entrance from the street through double doors, was held not to be selling in a "dwelling-place or shop": *McHole v. Davies*. (1) The question of the seller's intention is immaterial: *Wilcox v. Steel*. (2) In *Haynes v. Ford* (3) the defendant succeeded because he was selling in what was held to be his own shop. Sect. 42 of the private Act does not exempt the defendant: *Abergavenny Improvement Commissioners v. Straker*. (4) The question really is, as put by Cozens-Hardy M.R. in *Haynes v. Ford* (5), "Is this a case taken altogether out of the section on the ground that it is the establishment of a rival market?"

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*Romer, K.C.*, and *Beebee*, for the defendant. The defendant is within the exemption in s. 42 of the private Act, inasmuch as he is only selling "on any land or in any building belonging to him or in his occupation." Any sales are authorized by the exemption on Wednesdays, and if so, he can scarcely be outside the exemption by selling on other days. We do not contend that the plaintiffs can complain in respect of nothing except what is expressly forbidden by that section; but we submit that the section is exhaustive as to sales, and that sales impliedly authorized by it cannot be restrained on other grounds, such as the disturbance of market rights. *Abergavenny Improvement Commissioners v. Straker* (4), *Rutherford v. Straker* (6), and *Haynes v. Ford* (3) are authorities in our favour on this point. There is no reported decision that an auctioneer's business should be restrained, where s. 13 of the Act of 1847 or a similar provision in a special Act applies, except *Fearon v. Mitchell* (7), and that only decided that the selling was not in the seller's "own dwelling-place or shop." The other cases related to ancient, not statutory, markets, and have no application to the present case. In *Great Eastern Ry. Co. v. Goldsmid* (8) the railway company were not selling themselves, but letting out depots for other people to sell in. In *Birmingham Corporation v. Foster* (9) the sales were not within the statutory exception. In *Haynes v. Ford* (3) it was

(1) (1875) 1 Q. B. D. 59.

(2) [1904] 1 Ch. 212.

(3) [1911] 2 Ch. 237.

(4) 42 Ch. D. 83.

(5) [1911] 2 Ch. 248.

(6) (1887) 42 Ch. D. 85, n.

(7) L. R. 7 Q. B. 690.

(8) 9 App. Cas. 927.

(9) 70 L. T. 371.



SARGANT J. held that the selling of other people's goods on commission did not prevent the sale being within the seller's "own shop." Where a market is established under a special Act, the rights which attach to a prescriptive or franchise market are superseded by the statutory rights, and in such a case the sale of goods in the seller's own shop in the ordinary course of business is no disturbance of the statutory right of market: *Manchester Corporation v. Lyons*. (1)

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*Martelli, K.C.*, in reply.

*Cur. adv. vult.*

1914. Nov. 27. SARGANT J. (after stating the provisions of the private Act, as above stated). I am inclined to think that s. 42 of the private Act is an express variation of s. 13 of the Markets and Fairs Clauses Act, within s. 2 of the private Act; and accordingly that any exemption given by s. 13 of the Clauses Act to a sale in a shop is extended to a sale on any land or building belonging to or occupied by the vendor. Further, it is clear that the prohibition in s. 13, which applies to every day, is limited by s. 42 so as to apply to market days only, but I do not think that the exception from the prohibition in s. 42 can be so limited. It would be absurd to allow sales on market days which are forbidden on other days. The exemption in s. 42 must, in my view, extend the exemption in s. 13 so that houses and buildings belonging to or occupied by the vendor are freed, not only on market days, but on all days. [His Lordship stated on what days the market had been held, that the market accommodation was sufficient, and the other facts above stated, and continued:] It is obviously to the advantage of the defendant to prevent private sales and to concentrate the business in his own hands. And his evidence that he has succeeded in doing so was in my judgment unshaken. Nevertheless, I have no doubt that the defendant's sales, especially those on the day before the plaintiffs' market, do to some extent compete with and damage the plaintiff company's market, though no evidence of actual diminution or loss was given. As to this, it was not contended by the defendant that it was necessary for the plaintiff company to prove actual loss, and indeed

the defendant has claimed the right to do what he is doing whatever the result may be to the plaintiff company. Both parties desire me to determine the question of right.

On these facts I have no doubt that, had the plaintiffs' market been an ordinary or normal charter market, the monopoly incident to such a market would have entitled them to complain of, and succeed in restraining, the defendant's proceedings. (See for instance *Elwes v. Payne* (1).) And the case of *Birmingham Corporation v. Foster* (2) is an authority, were one needed, that the owners of a statutory market are in as favourable a position in this respect, apart from any express or implied provisions in the statute to the contrary. But, on the other hand, I am equally clear that the acts of the defendant, taken in their totality, do not go beyond selling or exposing for sale on land belonging to him or in his own occupation. For selling by auction is obviously one quite legitimate method of selling, and everything else that the defendant has done was in my opinion done in the ordinary course of, and exclusively for the purpose of, such selling. As was said by Byles J. in *Wiltshire v. Willett* (3), an action for penalties under legislation equivalent to s. 13 of the Clauses Act, "If it"—that is the place of sale—"was a shop, the mode of selling therein cannot deprive it of the ordinary privilege attached to a shop." The neat question, therefore, arises whether the words of exception occurring in such sections as s. 13 of the Clauses Act and s. 42 of the private Act merely give exemption from the penalties in the section and the prohibition implied in such penalties, or whether they also give exemption from any general prohibition against the excepted acts that would otherwise be inferred from the creation of a statutory market.

In my opinion the latter is the correct view. It is clear that, even where a statute continues an existing market, there may be implied from its language an intention to modify the nature of the franchise: *Manchester Corporation v. Lyons*. (4) And in the case of a new statutory franchise of market, such as the present, it seems to me that an intention may more readily be implied to negative or limit the rights of monopoly that would otherwise

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(1) 12 Ch. D. 468.

(3) (1861) 11 C. B. (N.S.) 240, 245.

(2) 70 L. T. 371.

(4) 22 Ch. D. 287.

SARGANT J. attach to the franchise. Here s. 13 of the Clauses Act and s. 42 of the private Act are expressly dealing with the subject of sales both from the prohibitive and the permissive aspects. And it would, in my opinion, be too refined and unpractical an interpretation of the legislation with regard to what is eminently a concrete practical question of everyday life to hold that the permissions given by these sections were only partial, and subject to a vague overriding prohibition arising from the monopoly ordinarily incident to a grant of market rights.

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Further, there is, in my opinion, definite authority for this view of the matter. In *Abergavenny Improvement Commissioners v. Straker* (1) Kekewich J. seems to me to have expressly decided that, when once it had been held that there was an express statutory exemption from penalties, an exemption from an injunction necessarily followed. *Birmingham Corporation v. Foster* (2) may at first sight seem opposed to this view, but when carefully examined I think that it supports it. It seems to me that the whole case turned upon the question whether the sales on the defendant's premises were within the exception contained in a penalties section analogous to the section now in question. Romer J. held, after a very careful consideration of the facts, that the sales were not within the words of exception, and accordingly granted an injunction in support of the plaintiffs' statutory monopoly. But it seems to me clear that, had his decision on the facts been that the defendant's sales were within the words of exception, he would not have granted any relief. Indeed on any other view his elaborate examination of the facts would have been unnecessary.

The recent case of *Haynes v. Ford* (3) is also an authority to the same effect. In that case all the members of the Court of Appeal, and most clearly of all Buckley L.J., acceded to the argument of the respondent that the general law of markets had nothing to do with the case, and that the sole question was whether the defendant's building was a shop within the words of exception in a penalties section in a private Act. There is, indeed, one passage in the judgment of the Master of the Rolls which

(1) 42 Ch. D. 83.

(2) 70 L. T. 371.

(3) [1911] 2 Ch. 237, 248.

was pressed on me by Mr. Martelli in supporting his view of the matter. But I think that the third alternative of a market suggested in that passage is suggested in relation to the true description of the defendant's building, and not in relation to the nature of the business carried on there except so far as it might affect the question whether the defendant's shop could be rightly described as a "shop" within the meaning of the section.

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In my opinion, therefore, the claim of the plaintiffs fails and the action must be dismissed with costs.

Solicitors: *Tippetts, for Coles, Sons & Tilburn, Hailsham and Eastbourne; Hart, Reade & Co.*

F. E.

*In re* CLANDOWN COLLIERY COMPANY.

ASTBURY J.

[001 of 1915.]

1915  
 Feb. 2.

*Company—Winding-up—Petition of Unsecured Creditors—Assets covered by Debentures—Business really carried on by Debenture-holder—Opposition of Large Majority of Unsecured Creditors—Special Circumstances—Just and equitable—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 129, 141, 145, 219.*

The business of a company which to the board's knowledge was hopelessly insolvent was being carried on in the company's name solely for the benefit of the chairman, who held all the 10,000*l.* debentures and was also an unsecured creditor for 10,000*l.* out of 13,597*l.* unsecured debts. The petitioners, who were unaware of this insolvency, were induced by the company to supply goods on credit, but when they obtained leave to sign judgment for their debt the chairman appointed a receiver, so that their judgment was fruitless.

The petitioners accordingly applied for a winding-up order. They were supported by a few trade creditors in a similar position, but the petition was opposed by the chairman, and by a large majority of other unsecured creditors who gave no reasons for their opposition:—

*Held*, in the special circumstances, that it was just and equitable that the company should be wound up.

*In re Alfred Melson & Co.* [1906] 1 Ch. 841, 844, and *In re Great Western (Forest of Dean) Coal Consumers Co.* (1882) 21 Ch. D. 769 applied.

PETITION.

The above company was incorporated in August, 1904, to carry



ASTBURY J. on the Clandown Colliery at Radstock. The nominal capital was 20,000*l.* divided into 5000 preference and 15,000 ordinary shares of 1*l.* each. The issued capital was 677 preference shares and 10,000 ordinary shares, all fully paid or credited as fully paid.

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*In re.*

In June, 1914, the company owed the petitioners 51*l.* for goods sold and delivered, and on November 21, 1914, they sued the company to recover this amount. On December 16, 1914, the Master made an order giving the petitioners liberty to sign judgment for 51*l.* and 8*l.* costs and to proceed to execution or otherwise enforce the judgment notwithstanding the Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 78). On December 21, 1914, an appeal from this order was dismissed by Scrutton J.

On December 24, 1914, a receiver and manager was appointed by the chairman, who held all the 10,000*l.* debentures of the company and was one of the two directors. He was also an unsecured creditor to the extent of 10,000*l.* for moneys advanced from time to time to keep the company on foot after a severe flooding. He also held all the 677 preference shares and 9551 out of the 10,000 ordinary shares issued.

On December 30, 1914, the petitioners signed judgment for 59*l.*, but were unable to satisfy it owing to the appointment of the receiver and manager.

On January 1, 1915, the petitioners presented this petition to wind up the company. It was supported by other trade creditors who had supplied goods to the company to the amount of 426*l.*, so that the total support was 485*l.*

At the original hearing on January 26 the petition was opposed by the company and the chairman, but on their counsel stating that there were sixteen trade creditors for goods supplied to the amount of 1169*l.* who wished to oppose, the petition was allowed to stand over on the terms of the chairman paying the costs of the day in any event, and the costs up to the day if the petitioners failed.

The total unsecured debts of the company amounted to 13,597*l.*, of which 10,000*l.* was due to the chairman.

The evidence in support of the petition was to the effect that

the petitioners and their supporters had given credit to the company without any suspicion that it was insolvent, a fact of which the chairman and his co-director were well aware, and that the chairman was using his position as director and debenture-holder to obtain goods in the name of the company, payment for which he was able to prevent by appointing a receiver.

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In opposition to this the chairman stated that in 1909 the colliery was valued at a break-up price of 5000*l.*, and that if the company's assets were now realized they would in his opinion not realize more than that amount and certainly not more than the amount of the debentures. He had appointed a receiver and manager with the sanction of the company in order to preserve the assets and he believed that the only prospect of the ordinary creditors being paid was that time should be given to the receiver and manager to carry on the business.

A mining engineer deposed that when the damaged workings were made good at the cost of another 1000*l.* the colliery as a going concern would be worth 25,000*l.*, and that in its present condition it might realize 12,000*l.* if a favourable opportunity were seized, but if disposed of by a forced sale it would only realize 6000*l.* or 7000*l.*

The sixteen creditors who opposed the petition made no affidavits giving any reasons for their opposition.

*Galbraith*, for the petitioners. There is ample jurisdiction to wind up this company, although the debentures swamp the assets,—*In re Chic, Ltd.* (1); *In re Crigglestone Coal Co.* (2); Companies (Consolidation) Act, 1908, s. 141—and it is just and equitable to do so here under s. 129. The facts speak for themselves. The company is hopelessly insolvent. The business is being carried on solely for the benefit of the chairman as sole debenture-holder, while at the same time goods are ordered in the company's name and not paid for. That is a state of things that ought to be stopped: *In re Alfred Melson & Co.* (3),

(1) [1905] 2 Ch. 345.

(2) [1906] 2 Ch. 327.

(3) [1906] 1 Ch. 841, 844.

ASTBURY J. where the facts were very similar. In that case, it is true, there  
 1915 was no opposition by unsecured creditors, but under ss. 145, 219  
 CLANDOWN the Court ought to consider not only the number of the opposing  
 COLLIERY creditors and the amount of their debts, but also the reasons  
 COMPANY, they assign for their opposition: *In re Great Western (Forest*  
*In re.* *of Dean) Coal Consumers Co.* (1) In the present case the  
 chairman's reasons are quite unconvincing, and the sixteen  
 fresh creditors give no reasons at all.

*Sheldon*, for creditors in support.

*J. H. Watts*, for the company and the chairman. The petitioners and their supporters are unsecured creditors for 485*l.* Against them are opposed the chairman, who, though a debenture-holder, is also an unsecured creditor for 10,000*l.*, and the sixteen creditors who represent 1169*l.* There will be nothing for any unsecured creditor if the company is wound up now. The chairman has throughout acted in the best interests of the company.

*Fairfax Luxmoore*, for the sixteen creditors opposing. I am instructed by the company's solicitors. I have no evidence, but I am instructed to say that my clients think the company had better go on.

ASTBURY J. This is a creditors' petition to wind up the company. The petitioners and their supporters are unsecured creditors for 485*l.* The petition is opposed by the company, the chairman, who is a debenture-holder for 10,000*l.* and an unsecured creditor for 10,000*l.*, and by sixteen other unsecured creditors for 1169*l.*, all appearing by the company's solicitors. The evidence shows that the petitioners and their supporters were induced by the company to part with their goods without any notice of the company's insolvency. The insolvency appears from the chairman's own statement. In *In re Alfred Melson & Co.* (2) Buckley J. had to deal with a similar question and his remarks are entirely applicable to the present case. The company for some time past has not been carrying on its own business, but the chairman has really been carrying on business as debenture-holder in the company's name, and the

(1) 21 Ch. D. 769.

(2) [1906] 1 Ch. 841, 844,

only suggestion in opposition to the petition is that if the company is allowed to go on in this way and obtain further credit there is a possibility of better times. This is a state of affairs that is not reasonable or proper in the interests of innocent unsecured creditors and it ought not to be allowed to go on. The case is well within the principles of *In re Alfred Melson & Co.* (1) and *In re Great Western (Forest of Dean) Coal Consumers Co.* (2) It is just and equitable that the company should be wound up, and I make the usual order.

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Solicitors: *Robbins, Olivey & Lake, for Hodding & Clark, St. Albans; Stibbard, Gibson & Co., for Gibson, Pybus & Pybus, Newcastle-upon-Tyne; Seymour Williams & Co., for Lawrence & Co., Bristol.*

G. R. A.

*In re* JONES' SETTLEMENT.

ASTBURY J.

STUNT v. JONES.

[1914 J. 1869.]

1915  
Feb. 4.

*Settlement—Husband's Life Policies—Wife First Life Tenant—Premiums paid by Wife—No Request by Trustees—Lien.*

*Power of Appointment—Limited Power—Appointment by Deed—Revocation—Avowed Object of obtaining Benefit—Fraud on Power.*

Policies on a husband's life were settled by a marriage settlement, the wife taking the first life interest. The husband covenanted to pay the premiums, but, owing to his want of means, the wife, in order to prevent the policies lapsing, paid the premiums voluntarily and without any request by the trustees. On the husband's death the trustees received the policy moneys:—

*Held*, that the wife was not entitled to a lien for the premiums.

*In re Leslie* (1883) 23 Ch. D. 552 applied.

Although the doctrine of fraud on a power does not apply to the release of a limited power,—*In re Somes* [1896] 1 Ch. 250—it applies to the revocation of an appointment thereunder. The donee cannot therefore revoke a previous appointment with the avowed object of obtaining a benefit by that revocation.

*Shirley v. Fisher* (1882) 47 L. T. 109 distinguished.

ORIGINATING SUMMONS.

By an ante-nuptial settlement dated January 25, 1876, and made

(1) [1906] 1 Ch. 841, 844.

(2) 21 Ch. D. 769.



ASTBURY J. between the husband of the first part, the wife of the second part,  
1915 and trustees of the third part, certain funds belonging to the wife  
JONES' were settled in trust for the wife for life for her separate use  
SETTLEMENT, without power of anticipation and after her death in trust for the  
*In re,* husband for life or until he incumbered and after the wife's death  
STUNT and the determination of the husband's interest in trust for the  
*v.* issue of the marriage born during the lives of the husband and  
JONES. wife or the survivor or within twenty-one years after the sur-  
vivor's death in such shares and upon such conditions as the  
husband and wife should by deed with or without power of revo-  
cation and new appointment jointly appoint and in default of  
such appointment as the survivor should in like manner or by will  
appoint and in default of such appointment in trust for the  
children of the marriage who being sons should attain twenty-  
one or being daughters should attain that age or marry in  
equal shares, with the usual hotchpot clause.

The ultimate trusts in default of children attaining a vested interest were for the wife if she survived her husband, or for her testamentary appointees, or statutory next of kin if she predeceased him.

Certain policies for 2000*l.* on the husband's life were also assigned to the trustees upon trust to hold the moneys to be received by them thereunder on the same trusts as the wife's fund except that the ultimate trust in default of children attaining a vested interest was for the husband.

The husband covenanted with the trustees to pay the premiums, and it was also provided that the trustees with the consent of the wife during her life and after her decease at their absolute discretion might apply any part of the income or if that was insufficient any part of the capital of the trust premises in paying the premiums, but it should not be obligatory on the trustees to enforce the husband's covenant in relation to the policies or to apply any part of the income or capital in payment of the premiums, and no omission or neglect in respect thereof should be chargeable as a breach of trust.

By a deed poll dated December 5, 1905, the husband and wife appointed all the trust property (subject to their own life interests) in trust for their only child and daughter Edith for life for her

separate use without power of anticipation and after her death for her children born during the lives of the appointors or the survivor or within twenty-one years after the survivor's death who being sons should attain twenty-one or being daughters should attain that age or marry in equal shares, and, in default of such children, in trust for the daughter absolutely.

Provided always that it should be lawful for the appointors during their joint lives by any deed revocable or irrevocable or for the survivor in like manner or by will wholly or partially to revoke the appointment and by the same or any other like instrument to appoint any new or other trusts or provisions concerning the trust funds or any part thereof which might be or would have been authorized by the power in the settlement given to the appointors or the survivor in that behalf.

The husband died on September 28, 1914, intestate, and the wife took out administration to his estate, which was worth 108*l*. The daughter was a spinster aged thirty-five, and there were no other children. The policy moneys amounting with bonuses to 3257*l*. were received by the trustees.

On October 28, 1914, the wife wrote to the trustees informing them that, her husband having no sufficient means of his own, she had for quite twenty-five years paid the premiums and thereby saved the policies from lapsing, and claiming recoupment accordingly.

On November 12, 1914, she wrote to the trustees referring to her claim to recoupment and continuing: "I beg to add that to enable this to be done, if I am not of right entitled to such payment I propose to revoke the joint appointment I and my husband made in 1905 as to a sum sufficient for the purpose and to release my power of appointing that sum otherwise than to my daughter Edith or to release altogether my power of appointment, and on that being done I and my daughter will direct payment out of the policy moneys. If you feel any difficulty in carrying out my wishes, I authorize and request you to take the opinion of the Court on the subject." On the same date the daughter wrote to the trustees to a similar effect.

It appeared that from 1890 to 1914 the wife had paid 890*l*. premiums direct to the insurance offices. She had also paid

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ASTBURY J. various sums to her husband out of which he had paid a few  
 1915 premiums, but her claim was limited to recoupment of the 890l.  
 JONES' directly paid by herself. These payments were admittedly made  
 SETTLEMENT, without any request by the trustees, and the wife had never  
*In re.* requested them to pay the premiums out of the income or capital  
 STUNT under their power in that behalf, the existence of which she had  
 v. forgotten. She paid the premiums to prevent the policies lapsing,  
 JONES. and without any agreement or understanding with her husband  
 — in relation thereto.

On November 18, 1914, the trustees issued this summons to determine (a) whether the wife was entitled to recoupment of the 890l. out of the policy moneys and (b), if not so entitled, whether the proposed revocation of the joint appointment and release of her power with the avowed object of obtaining recoupment would be a fraud on the power.

*F. E. Farrer*, for the trustees. First. The wife's payments were purely voluntary. There was no request by the trustees. The wife might possibly have a lien on her husband's interest, if it existed, but she can have none against the capital of the policy moneys which were settled on the daughter and her unborn children, whose interests the trustees are bound to protect: *In re Leslie*. (1)

Secondly. A power to revoke an appointment under a limited power is part of that limited power, and therefore fiduciary. This is shown by the fact that such a power of revocation cannot be delegated—e.g., joint appointors cannot reserve a power of revocation to one during the other's life, though if authorized by the settlement creating the power they may reserve a power of revocation to themselves and the survivor: *Burnaby v. Baillie* (2); *In re Harding* (3); Sugden on Powers, 8th ed. p. 365. The proposed revocation with the avowed object of obtaining a benefit is therefore a fraud on the power.

*Hewitt, K.C.*, and *T. Pakenham Law*, for the wife and daughter. First. Payments by a life tenant are in a different position from ordinary voluntary payments. This is expressly recognized in

(1) 23 Ch. D. 552.

(2) (1889) 42 Ch. D. 282, 301.

(3) [1894] 3 Ch. 315, 319.

*In re Leslie*. (1) The onus is on the trustees to show that they were intended as a present to the estate. ASTBURY J.

[ASTBURY J. The wife was not a life tenant in possession of these policy moneys when she made these payments.]

No. But she had the first life interest. In *Burridge v. Row* (2) the wife was given a lien under similar circumstances.

[ASTBURY J. Against the interest of her husband, who owned the policies subject to the payment of a sum secured thereby.]

Secondly. The release of a power is clearly not fiduciary—*In re Somes* (3)—and a revocation stands on the same footing: *Shirley v. Fisher* (4); Farwell on Powers, 2nd ed. p. 411.

[ASTBURY J. In that case there was no evidence that the father revoked his previous appointment with the view of obtaining a benefit.]

The facts pointed to such an intention and the case was argued on that footing.

*F. E. Farrer* in reply. In *Shirley v. Fisher* (4) the father became beneficially entitled to his deceased son's fourth share before he appointed to his other three children. His revocation merely restored the status quo ante. That is far removed from the present case.

ASTBURY J. The first question on this summons is whether the wife is entitled to repayment out of the policy moneys of the 890*l.* premiums paid by her in her husband's lifetime. She found that her husband was unable to pay these premiums and unfortunately without any request by her husband or the trustees she voluntarily paid them for twenty-five years, with the result that the policies and bonuses have accrued to the trust. There was a provision in the settlement that the trustees with the wife's consent might apply income or capital in payment of premiums, but this was not acted on and no request in that behalf was made by the wife. In *In re Leslie* (1) it was held that "when a person, not the sole beneficial owner, pays the premiums to keep up a policy of life insurance, he is entitled to

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(1) 23 Ch. D. 552, 565.

affirmed (1844) 13 L. J. (Ch.) 173.

(2) (1842) 1 Y. & C. Ch. 183, 192; (3) [1896] 1 Ch. 250, 255.

(4) 47 L. T. 109.



ASTBURY J. a lien on the policy or its proceeds in the following cases: (1.) By contract with the beneficial owner; (2.) By reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation; (3.) By subrogation to their right of some person who, at the request of trustees, has advanced money for the preservation of the property; (4.) By reason of the right of a mortgagee to add to his charge any money paid by him to preserve the property. In no other cases can a lien on a policy for premiums paid be acquired either by a stranger or by a part owner of the policy."

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—

In the present case I regret that I am obliged to come to the conclusion that the wife's payments were voluntary and that she is not entitled of right to recover them.

The second question is comparatively unimportant. By the marriage settlement the wife's funds and the policies were settled (subject to the life interests of the wife and husband) in trust for the issue of the marriage as the husband and wife should by deed with or without power of revocation and new appointment jointly appoint and in default of such appointment as the survivor should in like manner or by will appoint and in default of appointment in trust for the children of the marriage who being sons should attain twenty-one or being daughters should attain that age or marry in equal shares.

In 1905, while the wife was paying the premiums the husband and wife appointed the trust property (subject to their own life interests) in trust for their daughter (their only child) for life and after her death in trust for her children as therein mentioned and in default of such children for the daughter absolutely. The appointors reserved a power of revocation and new appointment to themselves or the survivor.

The husband died on September 28, 1914, and the wife, believing that she was entitled to repayment out of the policy moneys of the 890*l.* she had paid for premiums, unfortunately wrote to the trustees on November 12, 1914, stating that for the purpose of enabling her to obtain payment, if she was not of right entitled thereto, she proposed to revoke the joint appointment and to release her power, and that being done she and her daughter would direct payment out of the policy moneys.

The question I propose to answer is whether, if she acts on this statement and intention, the trustees are bound to make the payment.

There is no doubt that the donee of a limited power is entitled to release it notwithstanding the fact that he thereby obtains a benefit. In *In re Somes* (1) Chitty J. said: "There is a fallacy in applying to a release of a power of this kind the doctrines applicable to the fraudulent exercise of such a power. There is no duty imposed on the donee of a limited power to make an appointment; there is no fiduciary relationship between him and the objects of the power beyond this, that if he does exercise the power of appointment, he must exercise it honestly for the benefit of an object or the objects of the power, and not corruptly for his own personal benefit; but I cannot see any ground for applying that doctrine to the case of a release of a power; the donee of the power may, or he may not, be acting in his own interest, but he is at liberty, in my opinion, to say that he will never make any appointment under the power, and to execute a release of it."

In this particular case, however, the wife's proposal involves not merely a release of her power, but a revocation of the existing appointment in favour of the daughter and her children; and in my opinion a power of revocation and new appointment is fiduciary and must be exercised for the purposes and objects of the original power.

In opposition to this view I have been referred to *Shirley v. Fisher*. (2) In that case the marriage settlement gave the father a power of appointment by deed or will among the children of the marriage. In default of appointment the trust fund went to the children in equal shares as tenants in common. There were four children, one of whom died in 1869 a bachelor and intestate. In 1876 the father appointed the trust fund after his death to his three surviving children in equal shares, reserving a power of revocation. In 1880 he revoked the appointment, and in 1881 he took out letters of administration to his deceased son's estate. He then proposed to release his power, submitting that he would thereby become entitled to his deceased son's fourth share. In

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(1) [1896] 1 Ch. 250, 255.

(2) 47 L. T. 109, 111.

ASTBURY J. the circumstances of that case Bacon V.-C. held that there was no fraud on the power or any impropriety in the father's revocation. There was no evidence that he exercised the power of revocation for a fraudulent or improper purpose or with the direct object of putting in his own pocket any money to which he would not have been entitled as his son's representative if the original appointment had not been made. He derived no benefit but what the law gave him. Bacon V.-C. said: "In the case here, under the settlement, by the death of the son who died first, if no appointment was made the father became absolutely entitled to that son's share of the fund. The father made an appointment of the entire fund, and he reserved to himself a power to revoke that appointment. Was there anything fraudulent in that? What does it mean? Not a power derived from the settlement, but a power which he himself, in the exercise of his own power, chose to reserve . . . . Is there anything unlawful in that? It is said there is, because he derives some benefit from it. He derives no benefit from the settlement; he derives benefit from the accident that has happened. The law has vested in him the share which his deceased son would take if no appointment was made. Being better advised, or having thought the matter over, and having seen that he would do injustice by permitting his appointment of 1876 to remain, he exercised that power which was his personal power, not derived from the settlement, but the power which he had reserved in his own hands, to put an end to that appointment . . . . I can find no fact or suggestion or reasons whatever, except only that I am called upon to suspect that he meant a fraud because he derives a benefit from it. He derives no benefit but that which the law has given him. Suppose somebody else had been the administrator of the son. Suppose, for the purpose of trying it, that the father had executed the deed of 1876, and that afterwards somebody had taken out letters of administration to his son, and wanted the money to pay the son's debts. Common justice would induce the father to revoke that appointment, and leave things as they were."

In Farwell on Powers, 2nd ed. p. 411, it is stated that it is not "necessarily" fraudulent for a father, who has executed an

appointment reserving to himself a power of revocation, to exercise such power of revocation, although the effect will be to entitle him to a share in the fund in default of appointment. After referring to the facts in *Shirley v. Fisher* (1) the text-book continues: "It was held that there was no evidence of fraud in these circumstances, and that the father was entitled to the share."

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In the present case, although there is no evidence of fraud in the ordinary sense, I still have to determine whether it is not what is called a fraud on the power for the wife to execute her fiduciary power of revocation with the avowed object of getting 890*l.* for herself, she being neither an object of the power, nor entitled in default of appointment. There can only be one answer to that question. I answer it by saying that if the wife with the avowed object of obtaining this 890*l.* revokes the appointment, releases her power, and she and her daughter then call on the trustees to pay the 890*l.*, they are not bound to pay it. I answer the question in this definite form in order to leave the wife free to execute in the future any bona fide revocation and release if so advised.

Solicitors: *Bockett, Stunt & Bockett.*

N.B.—For a similar decision on the first point see *In re Waugh's Trusts* [1877] W. N. 114; 46 L. J. (Ch.) 629.

(1) 47 L. T. 109.

G. R. A.



ASTBURY J. *In re* RUBBER AND PRODUCE INVESTMENT TRUST.

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[00200 of 1913.]

Feb. 16, 17.

*Company—Winding-up—Liquidator—Removal—“Cause shown”—Committee of Inspection—Removal—Jurisdiction—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 149, 152.*

A winding-up order was made on a contributories' petition containing serious charges of misfeasance against the directors, and a liquidator and committee of inspection nominated by the contributories were appointed with the view of making a thorough investigation.

At that time the company was apparently solvent with a balance for the contributories which might be increased by misfeasance proceedings. Subsequently, however, a very heavy claim was admitted and it was found that the company, notwithstanding the amount possibly recoverable in misfeasance proceedings, was hopelessly insolvent.

The liquidator and committee of inspection, acting quite bona fide and in pursuance of what they believed to be their duty under the order appointing them, continued to treat the liquidation as a contributories' liquidation and proposed to spend the creditors' assets in misfeasance proceedings against the wishes of the creditors.

The creditors applied to remove the liquidator and the committee of inspection:—

*Held*, that there was sufficient “cause shown” for removing the liquidator under the Companies (Consolidation) Act, 1908, s. 149, sub-s. 6.

*In re Oxford Building and Investment Co.* (1883) 49 L. T. 495 and *In re Adam Eyton, Ltd.* (1887) 36 Ch. D. 299 applied.

*Seem*le if the present committee of inspection did not act in harmony with the new liquidator appointed on behalf of the creditors, the Court would have jurisdiction to remove them by the indirect method suggested in *In re Radford & Bright, Ltd.* [1901] 1 Ch. 272, 735, namely, by resummoning the first meetings of the creditors and contributories under s. 152, and then appointing the creditors' nominees.

## SUMMONS.

The above company was incorporated on March 29, 1910, with a capital of 20,000*l.* divided into 200,000 shares of 2*s.* each. It issued 167,652 shares and received 16,713*l.* 19*s.* cash, leaving 51*l.* 5*s.* unpaid calls due. It also received 7997*l.* 16*s.* premiums, making a total cash capital of 24,711*l.* 15*s.* received on the share issue.

On March 5, 1913, the company was wound up voluntarily by special resolutions of February 12 and March 5, 1913.

On June 13, 1913, certain shareholders presented a petition for a compulsory order, alleging certain acts of misfeasance against the directors.

On July 8, 1913, Neville J. made a compulsory order, notwithstanding the opposition of creditors and a majority of the shareholders, on the ground that there were grave circumstances requiring investigation.

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On September 24, 1913, the first meetings of creditors and contributories were held. The creditors nominated the voluntary liquidator as liquidator, but did not nominate any committee of inspection. At the contributories' meeting eight contributories holding 56,305 shares voted for the present liquidator and three contributories holding 77,936 shares (mostly vendor's shares) voted for the voluntary liquidator. At the same time they unanimously nominated the three members of the present committee of inspection.

On October 29, 1913, the Court appointed the present liquidator and appointed the contributories' nominees to be the committee of inspection.

At this date the only substantial asset of the company consisted of 25,000 fully-paid 1l. shares in a Brazilian company which were valued by the directors at 1s. a share, i.e., 1250l. The debts were 884l., of which 500l. claimed by the directors for fees was disputed, so that the company was apparently solvent, and there was a balance for the shareholders which might be increased by misfeasance proceedings.

On November 26, 1913, the official receiver made his report under s. 148 of the Companies (Consolidation) Act, 1908, stating (inter alia) that he was not aware of any matter relating to the promotion, formation, or failure of the company or the conduct of the business that in his opinion rendered any further inquiry desirable.

Some time after this the applicants, whose claim was at first disputed, were admitted as creditors for 46,900l., an amount which would entirely swamp the assets unless very large sums indeed were recovered from the directors.

Having regard to the official receiver's report, and to the fact that they believed that any judgment against the directors

ASTBURY J. would be fruitless, the applicants and other independent creditors did not desire any misfeasance proceedings, or any longer prolongation of the liquidation. Seeing that there was no market for the Brazilian shares, which they believed to have a considerable intrinsic value, they desired a division in specie among the creditors instead of a sale at a sacrifice.

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In April, 1914, the liquidator ordered his brokers to sell 10,000 Brazilian shares at 10*d.* to pay the costs of the liquidation. On April 24, 1914, the applicants wrote to the liquidator asking for a withdrawal of this order. On April 25, 1914, the liquidator refused, saying that he had acted on the instructions of the committee of inspection, who had all the statements as to the problematical value of the shares before them, but he would be glad to be informed of any source of realization. On April 27, 1914, the applicants intimated that if the shares were sold the liquidator would be held responsible. On April 29, 1914, the liquidator replied that he would consider any scheme put forward by the creditors to obviate the necessity of selling the 10,000 shares to pay the costs of the liquidation.

No definite scheme was put forward and the liquidator had to sell the 10,000 shares to pay the costs of the liquidation.

On September 1, 1914, in answer to a suggestion that a creditor nominated by the applicants should be appointed an additional member of the committee of inspection, the liquidator's solicitors replied that the liquidator was appointed by the Court in the interests of the shareholders, that the committee of inspection were shareholders and not creditors, and in the liquidator's view the interest of the applicants' nominee as a creditor would or might conflict or interfere with the full investigation which the liquidator was making on behalf of the shareholders.

On November 25, 1914, the applicants issued this summons for an order

(a) to remove the present liquidator and appoint the applicants' nominee or some other nominee of the creditors as liquidator;

(b) to remove the present committee of inspection and appoint four persons to be nominated by the creditors or alternatively to appoint four persons so nominated as additional members;

(c) alternatively to resummon first meetings of the creditors and contributories for the purpose of determining again whether an application should be made to the Court for the appointment of a committee of inspection to act with the liquidator and who they should be, and also (if necessary) for nominating a liquidator in place of the present liquidator.

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No personal charge whatever was made against the present liquidator, but the applicants alleged that he and his committee of inspection were conducting and considered themselves entitled to conduct the liquidation in the supposed interests of the contributories and had no intention of endeavouring to preserve the small remaining assets for the creditors.

In reply to this the liquidator referred to the compulsory order and said that the reason the Court appointed him as liquidator was to ensure the investigation which it held should be made into the affairs of the company with the obvious intention of endeavouring to obtain further assets by misfeasance proceedings, if necessary and appropriate, to satisfy the claims of both creditors and contributories. He also stated that he was informed that at least one of the directors was a man of substance and would be able to meet an order for damages for misfeasance, but he did not say which director could do this, nor did he suggest that there was the faintest possibility of recovering an amount in any way sufficient to meet the existing claims.

He submitted that, having regard to the direction of the Court that a full inquiry should be made into the transactions of the company, for which purpose the compulsory order was made, and seeing that it was only by this means that the contributories, at whose instance the order was made, could get any benefit therefrom, he and the present committee of inspection ought not to be supplanted by persons who avowedly proposed to carry on the liquidation in the interests of the creditors only. If so the sole object of the order would be frustrated and the great trouble taken by himself and the committee of inspection in going into the company's affairs would be entirely lost. The committee were now considering the advisability of taking proceedings against the directors, having regard to counsel's opinion, but he should take steps only if advised that they would be productive.



ASTBURY J. *Gordon Brown*, for the applicants. The present state of things is impossible. The liquidator and his committee are acting solely in the interests of the contributories, although the liquidation has now become purely a creditors' liquidation. The liquidator can be removed "on cause shown" under s. 149, sub-s. 6. Personal misconduct or unfitness is not necessary. It is quite sufficient if his removal is in the interests of those really concerned in the liquidation, i.e., here the creditors: *In re Oxford Building and Investment Co.* (1), which was the case of a voluntary winding-up under supervision; *In re Adam Eyton, Ltd.* (2); Buckley on Companies, 9th ed. p. 426.

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There is more difficulty in removing the committee of inspection, who were appointed under s. 152. A member representing creditors may be removed by the creditors and a member representing contributories may be removed by the contributories under s. 160, sub-s. 6. But the Court has no direct statutory power of removal. It can only do it indirectly by directing the first meetings of creditors and contributories to be resummoned under s. 152: *In re Radford & Bright, Ltd.* (3); Buckley on Companies, 9th ed. p. 376. Of course each meeting would elect their own nominees, and then the Court could appoint in the best interests of the liquidation. This is no doubt a device for getting round an obvious defect in the Act.

[ASTBURY J. If you succeed in getting a new liquidator, he may be able to work in harmony with the present committee. You had better wait and see.]

An order to remove the liquidator and appoint a new one will do for the present, and the rest of the summons can stand over.

*Roope Reeve*, for the liquidator and committee of inspection. The liquidator can only be removed "on cause shown": *In re Sir John Moore Gold Mining Co.* (4) The Court must consider what was the purpose for which he was appointed: *In re Adam Eyton, Ltd.* (5) The onus is on the applicants and their sole case is that the liquidator is endeavouring to carry out the order on which he was appointed.

(1) 49 L. T. 495.

(2) 36 Ch. D. 299.

(3) [1901] 1 Ch. 272, 735.

(4) (1879) 12 Ch. D. 325, 331.

(5) 36 Ch. D. 306.

[ASTBURY J. That order was made when there was apparently ASTBURY J. a surplus for contributories. It was a contributories' liquidation, and even then the official receiver did not think any further inquiry was necessary. Now it is purely a creditors' liquidation.]

The official receiver's report is made at a very early stage of the proceedings and it does not bind the liquidator. The suggestion of Kay J. in *In re Oxford Building and Investment Co.* (1) was only a dictum. There is no personal allegation against the liquidator. If it were suggested that he was going to exercise his powers improperly the applicants could restrain him under s. 151, sub-s. 3. He would, however, be quite willing to undertake to sell no more Brazilian shares and to take no misfeasance proceedings without the applicants' consent.

*Gordon Brown* in reply. That would merely give the applicants a right of veto. But this is clearly a creditors' liquidation and the applicants and other creditors are entitled to conduct it by their own liquidator, who on their behalf will consider and decide on the advisability of any misfeasance proceedings and conduct any that are deemed advisable.

ASTBURY J., after stating the facts and pointing out that the liquidation, which at the time of the winding-up order and the appointment of the liquidator and committee of inspection was apparently a contributories' liquidation, had now become a creditors' liquidation pure and simple, continued: In my judgment, having regard to the fact that the creditors alone are interested, and to the official receiver's report, the creditors are entitled to decide whether the assets are to be expended in misfeasance proceedings.

It is contended that as there is no personal charge against the liquidator the Court has no power to remove him. Sect. 149, sub-s. 6, of the Companies (Consolidation) Act, 1908, provides that a liquidator appointed by the Court may resign or, "on cause shown," be removed by the Court. Now the words "on cause shown" have not quite the effect of "if the Court shall think fit." Jessel M.R. said in *In re Sir John Moore Gold Mining Co.* (2), "they point to some unfitness of the person—it may be

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(1) 49 L. T. 495.

(2) 12 Ch. D. 325, 331.

ASTBURY J. from personal character, or from his connection with other parties, or from circumstances in which he is mixed up—some unfitness in a wide sense of the term.” But, as pointed out by the Court of Appeal in *In re Adam Eytton, Ltd.* (1), this definition was not intended to be exhaustive, and if the Court is satisfied on the evidence that it is desirable in the interests of all those interested in the assets that a particular person shall not manage the assets, the Court has power to remove him, without there being shown any personal misconduct or unfitness, and in *In re Oxford Building and Investment Co.* (2) Kay J. expressed an opinion that where the debts more than absorbed all the assets the creditors were entitled to remove the liquidator appointed by the shareholders in a voluntary winding-up under supervision.

Sect. 145 provides that the Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence, and s. 219 provides machinery for ascertaining those wishes.

The liquidator contends, however, that the creditors are fully protected by s. 151, sub-s. 3, which provides that the exercise by the liquidator in a winding up by the Court “in England” of the powers conferred by the section “shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.” But sub-s. 1 provides that the liquidator in a winding up by the Court shall have power, in the case of a winding up in England with the sanction “either” of the Court “or” of the committee of inspection, (a) to bring or defend any action or other legal proceeding in the name and on behalf of the company.

Now here the liquidator and committee of inspection are obviously acting solely in the interests of the shareholders. The shareholders have nothing to lose by misfeasance proceedings, and only stand to gain in the almost impossible event of the company recovering more than enough to pay the liquidation expenses and the creditors. In these circumstances the creditors are entitled to an order to remove the present liquidator, and there must be a reference to chambers to appoint a new one.

(1) 36 Ch. D. 299.

(2) 49 L. T. 495.

The second matter is more difficult. The Court has no direct statutory power to remove a committee of inspection. Sect. 160, sub-s. 6, provides that any member of the committee may be removed by an ordinary resolution at a meeting of creditors (if he represents creditors), or of contributories (if he represents contributories). It is admitted that it would be idle in this case to call a further meeting of contributories, as they would simply appoint the same committee of inspection.

In *In re Radford & Bright, Ltd.* (1) Wright J. decided that "In the winding up of a company by the Court, the Court has power to order the first meetings of the creditors and contributories to be resummoned, and it may limit the purposes of the meetings to the selection of persons to be appointed as members of the committee of inspection."

If this were done in the present case it is admitted that the creditors would nominate a fresh committee while the contributories would nominate the present committee. The Court would then have to decide which nominees were to act, and this being now a creditors' liquidation there would be no doubt as to the duty of the Court in the matter.

With that expression of my opinion, I propose to make no order now on the second question, but I will allow that part of the summons to stand over to see whether the present committee of inspection can act in harmony with the new liquidator. If that is found impossible the summons can be restored.

[By consent the applicants' nominee was then appointed liquidator to save the expense of a reference to chambers.]

Solicitors; *Herbert Smith, Goss, King & Gregory; G. S. Warmington & Edmonds.*

(1) [1901] 1 Ch. 272, 735.



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Nov. 12, 13;  
Dec. 16, 17.

*In re* TONGUE.

*In re* BURTON.

HIGGINSON *v.* BURTON.

[1914 T. 963.]

*Election—Compensation—Spinster—Restraint on Anticipation.*

The doctrine of election applies in the case of a spinster to whom an interest with a restraint on anticipation during coverture is given by the same instrument as that which gives rise to the question of election.

*Haynes v. Foster* [1901] 1 Ch. 361 distinguished.

#### ADJOURNED SUMMONS.

Mrs. Janet Tongue, by her will dated November 27, 1908, after appointing William Frederick Higginson and the Rev. Christopher John Whitehead trustees and executors thereof, bequeathed (inter alia) the following specific legacy: “(c) To my four nephews and nieces Mary Cockburn Raven (the wife of Charlton C. Raven), Agnes Maria Maude Burton, Robert Graham Burton and John Alexander Spiers Burton my one thousand three hundred and fifty nine pounds eight shillings and three pence South Australian Government Four per Cent. Inscribed Stock (or such other sum thereof as I at the date of this my will possess but not including any accretions subsequent to that date) in equal shares.” The testatrix then devised and bequeathed the residue of her real and personal estate unto her trustees upon trust to sell and convert and after payment thereof of her funeral and testamentary expenses and debts and the legacies bequeathed by her will to stand possessed of the residuary trust moneys in trust for her four daughters Sidney Agnes Hepburn, Margaret Cecilia Fanny Tongue, Dorothy Janet Jesson, and Anne Louise Fletcher in equal shares. And she declared that her trustees should retain the share of any one of her said daughters of and in the said residuary trust funds upon the trusts following (that was to say): upon trust to invest the same and pay the income thereof to her said daughter for life, “and so that if and while she shall be under coverture the same shall be for her separate use and

she shall not have power to dispose of the same in the way of anticipation," and from and after the decease of such daughter in trust for the children of her same daughter or any of them, and in such manner as she should by any deed or deeds or by her will appoint; and in default of such appointment, and so far as any such appointment should not extend, in trust for the children of her said same daughter who being male should attain the age of twenty-one years or being female should attain that age or marry in equal shares, and if there should be only one such child the whole to be in trust for that one child. And in case there should be no child of her same daughter who being male should attain the age of twenty-one years or being female should attain that age or marry, then upon such trusts and in such manner as her same daughter should by deed or will when not under or by will while under coverture appoint.

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The testatrix died on January 10, 1914.

The four nephews and nieces named in the will, who were the children of John Burton, the deceased brother of the testatrix, survived her.

The four daughters of the testatrix also survived her. Three of them were married, and one, M. C. F. Tongue, was still a spinster.

This was an originating summons taken out by the executors of the will for the determination (*inter alia*) of the questions (1.) whether the 1359*l.* 8*s.* 3*d.* South Australian stock was property of which the testatrix was competent to dispose or whether it belonged to her daughters, and (2.) if it belonged to her daughters, whether they were put to their election as regarded it and, in the event of their electing to take against the will, would have to compensate the nephews and nieces.

Warrington J. held upon the facts that the whole subject-matter of the specific legacy of the South Australian stock was in fact the property of the children of the testatrix, in which she had only a life interest, and that the legatees could therefore take nothing in respect of that bequest except by virtue of the doctrine of election.

On this finding it was admitted on the authority of *In re*

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*Wheatley* (1) that the three married daughters being restrained from anticipation were not put to their election. The only question calling for a report was whether the spinster daughter was put to her election.

*J. Samuel Green*, for the summons.

*A. Underhill*, for the four daughters of the testatrix. The three daughters of the testatrix being restrained from anticipation are not put to their election as regards their life interests in the property settled by the testatrix. The case is the same, it is submitted, as regards the daughter who is still a spinster. In *Haynes v. Foster* (2) Kekewich J. held that a widow who whilst married was restrained from anticipation was not put to her election. That decision applies, it is submitted, equally to the case of a spinster who if she were married would be so restrained. The intention of the testatrix in the present case was that her four daughters should take equally. If the doctrine of election applies in the case of the spinster daughter they will not take equally, because the spinster daughter will have to contribute to the extent of her life interest whilst the married daughters will not.

*H. T. Methold*, for R. G. Burton and J. A. S. Burton. Having regard to *In re Wheatley* (1), it is admitted that the married daughters of the testatrix are not put to their election as regards their life interests under the will, but it is submitted that the case is otherwise as regards the spinster daughter. *Haynes v. Foster* (2), if good law, is distinguishable on the ground that in that case the restraint on anticipation was imposed during the whole life, whereas in the present case it is confined to coverture only. In a recent note, however, in *White and Tudor's Leading Cases* (3) it is stated: "In *Haynes v. Foster* [1901] 1 Ch. 361, the beneficiary was discoverd at the date that the obligation to elect arose, but was not put to her election. Quaere, whether this decision is reconcilable with principle."

[He also referred to *Hamilton v. Hamilton*. (4)]

(1) (1884) 27 Ch. D. 606.

(3) 1 Wh. & T. L. C., 8th ed.

(2) [1901] 1 Ch. 361.

p. 448, n.

(4) [1892] 1 Ch. 396.

*T. K. Crossfield*, for A. M. M. Burton and M. C. Raven, adopted the same argument. WARRINGTON J.

*A. Underhill* in reply.

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WARRINGTON J. The first question is whether any part of the legacy of 1359*l.* 8*s.* 3*d.* South Australian stock, given by the will of Janet Tongue, can take effect directly, that is to say, otherwise than by virtue of the doctrine of election; in other words, whether any part of this stock was property of the testatrix which she was competent to bequeath, or whether it was wholly the property of other persons. The facts are certainly peculiar and rather complicated. [His Lordship stated the facts and held that the South Australian stock was property which belonged to the four daughters of the testatrix subject only to her life interest. He continued:] Now comes the question of election. The children of Janet Tongue take benefits under her will, and nobody disputes that if there were no other difficulty in the matter, and they took those benefits absolutely, they would be put to their election between those benefits and their right to the South Australian stock, and if they insist upon their right to the stock then they must make compensation to the legatees out of the benefits which they take under the will.

As to the general principle there is no dispute at all; but all the four children of Janet Tongue are women—three of them are married and one is a spinster. Janet Tongue, by her will, has not given them their shares in the residue of her estate absolutely, but has settled the shares upon them and their children in the following manner: [His Lordship read the provisions of the will as above set out and continued:] I may clear away one point at once. It seems to me that the only interests which are available in order to give effect to the doctrine of election are the life interests of the daughters. They are in fact the only interests which they take. As far as the power of appointment by deed or will is concerned, it is not an interest at all; it may never be exercised, and in default of appointment the share will go to other people.

Now with regard to the life interests, the three children who are under coverture are restrained from anticipation, and, so



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far as they are concerned, it seems to me that there is no question that they cannot be called upon to elect, for the reason that the testatrix, by imposing the restraint on anticipation, has shown an intention that while under coverture they should not be capable of disposing of that which they take under her will, either by virtue of the doctrine of election or otherwise. With regard to those three married daughters the case is covered by the decision of Chitty J. in *In re Wheatley*. (1) The head-note in that case is this: "In the case of a married woman to whom an interest with a restraint on anticipation attached thereto is given by the same instrument as that which gives rise to a question of election, the doctrine of election does not apply, as the value of her interest in the property to be relinquished by way of compensation has, by the terms of the instrument, been made inalienable." The learned judge expresses that in his judgment in these terms (2): "The property, which, it is said, must be sequestered for the purpose of making compensation to the persons who have been disappointed by the failure of the appointment in their favour, is property given in such a manner that the testatrix herself must be deemed to intend that the persons to whom she gives it shall not deal with it, and that it shall not be dealt with adversely to them; and to imply a condition of election would be to imply a condition of election against the express language of this will." It seems to me, therefore, so far as the married daughters are concerned, that on the authority of that decision they are not put to their election. They can take their shares of the South Australian stock without making any compensation to the legatees, the Burton children.

As to the daughter who is still a spinster, I confess that, having regard to *In re Wheatley* (1) and to the principles enunciated by Chitty J. in his judgment, I should have felt no difficulty at all. I should have considered that the fact that she would be restrained from anticipation if and when she married would be immaterial, and that inasmuch as she was now capable, at the time when the right to compel election has

(1) 27 Ch. D. 606.

(2) 27 Ch. D. 613.

arisen, of disposing of her interest under the will, there is no expression of intention on the part of the testatrix inconsistent with her being compelled to make that election. But a difficulty is created by the judgment of Kekewich J. in *Haynes v. Foster*. (1) The head-note of that case is this: "A testator, who owned land in Turkey, by his will directed it to be sold and the proceeds treated as part of his residuary estate, and he gave an interest in his residuary estate to a married daughter coupled with a restraint upon anticipation. By the law of Turkey the testator had no power to dispose by will of the proceeds of sale of the Turkish property, which became divisible amongst his children. Pending an application for payment out of Court of the proceeds of sale, the married daughter became a widow"—therefore at the time the question arose she was not under restraint. "Held, that the testator by adding the restraint on anticipation shewed an intention inconsistent with the application of the doctrine of election." So far, of course, that is consistent with and follows the decision of Chitty J. in *In re Wheatley*. (2) The head-note continues: "and that that intention was not affected by the fact that the daughter had subsequently become discovert." It is said, and I think said truly, that if that decision is right, and if it applies to the present case, and is not distinguishable from it, it would cover the case of a daughter who has never married as much as one who has married and has become a widow. I think that contention is sound. But does the case apply to the present case? The argument there, in support of the contention that the doctrine of election did apply to the case of the widow, was that the expression of intention on the part of the testator was not that the woman in question should be throughout her life restrained from anticipation, but that the very essence of the restraint on anticipation attached to the gift for separate use was that the woman was to be restrained during coverture; that that was the only intention expressed by the testator. Kekewich J. deals with that in this way. Having first said that he thinks the case comes within *In re Wheatley* (2), he says (3): "There is,

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BURTON,  
*In re.*

HIGGINSON  
*v.*

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(1) [1901] 1 Ch. 361.

(2) 27 Ch. D. 606.

(3) [1901] 1 Ch. at p. 369.

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however, a subordinate point of which I find no trace in any of the other cases, but of which, after the arguments dealing with it, I am bound to take notice." I do not quite understand why the learned judge treated it as a subordinate point. It seems to me to be the point which went to the root of the whole matter which he had to determine. But, however, he seems to have attached less importance to it than I think ought to be attached to it. He continues: "It is said that the restraint on anticipation indicates only what Mr. Warrington styled a limited intention. It was argued in fact that, as the restraint can only operate during coverture, the testator must be taken to have intended that only during coverture it should interfere with election. This argument of course proceeds on the proposition that testators are supposed to know the law. So they are; but it does not follow that you must attribute to them knowledge of the refined doctrines of equity; and in my judgment it would be going much too far to say that when a testator restrains a woman from anticipation he must be taken to intend—although no doubt that is the result—that if at any time during her enjoyment she is discovert, the restraint will become wholly inoperative against her alienation." The learned judge, therefore, founded his judgment on that argument on the assumption that the testator in that case had no idea of confining the restraint to the period of coverture only.

I will now turn to look at the terms in which the restraint was imposed in that case. The will directed that two sums of 8000*l.* each should be set aside for the benefit of the testator's two daughters Lady Lacon and Lady Thomas, and the residue of the estate was directed to be held upon trust for his son Arthur Foster for life, and after his decease upon the usual trusts in favour of his children, and on the default or failure of issue to stand possessed of the same upon the trusts thereafter respectively declared of the investments representing the two sums of 8000*l.* Then as to the investments representing the first sum of 8000*l.* the testator directed his trustees to stand possessed thereof upon such trusts in favour of his daughter Lady Thomas and her issue as should correspond with the trusts thereinbefore declared in favour of his son Arthur Foster and his issue, but so, never-

theless, that his said daughter should not have power to deprive herself by way of anticipation of the annual produce to which she should so become entitled for her life, and should take the same for her sole and separate use. The point for which I refer to that is this, that in that case in the imposition of the restraint on anticipation the testator made no reference to coverture, and, so far as its terms were concerned, the restraint on anticipation might extend during the daughter's whole life, and I think that that is what the learned judge must have had in his mind when he made the remarks which I have read, and for this reason, that he concludes that part of his judgment with these two sentences which I have not yet read: "I put to counsel during the argument this test, which, on reflection, seems to me a good one. If the testator purported to restrain a man from alienation, his direction would be futile, because the law would not allow it; but could it be said that he did not intend such restraint to take effect? Intention, which depends on the construction of the testator's language, and the legal effect of that language are two different things." I think, therefore, I must take it that the learned judge drew his inference as to the intention of the testator in that case from the language of the will. In this will the language is different. The restraint is imposed in these terms: "so that if and while she shall be under coverture the same shall be for her separate use and she shall not have power to dispose of the same in the way of anticipation." In this case, therefore, the testatrix has expressly confined her intention to restrain the daughter from anticipation during the period she is under coverture.

In my opinion, therefore, whatever may be the true view as to the general doctrine enunciated by Kekewich J. in *Haynes v. Foster* (1), it seems to me that that case is distinguishable from the present case, and that the testatrix has clearly shown the limited intention or the intention to impose the limited restraint which counsel sought to persuade the learned judge was imposed in *Haynes v. Foster* (1), but which in this case is clearly imposed by the express terms of the will. I hold, therefore, that while

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WARRING- the married daughters are not put to their election the spinster  
 TON J. daughter is, and that to the extent of her life estate she will have  
 1914 to compensate the legatees of the South Australian stock for the  
 TONGUE, loss which, if she elects to take against the will, they will suffer by  
*In re.* that election.  
 BURTON,  
*In re.*  
 HIGGINSON Solicitors: *Long & Gardiner, for Marlow, Marten & Jesson,*  
*v.*  
 BURTON. *Walsall; Whitford & Thorp.*

W. I. C.

ASTBURY J.

*In re* HARGROVE.

1915

HARGROVE *v.* PAIN.

*Jan.* 29;  
*Feb.* 3.

[1914 H. 2714.]

*Election—Restraint on Anticipation—Contrary Intention—Spinster.*

A testator gave a share of his residuary estate in trust for a spinster for life, coupled with a restraint on anticipation which was not in terms confined to coverture. He also disposed of other property which, as it happened, belonged to the spinster:—

*Held* that, notwithstanding the attempted restraint on anticipation, the spinster was put to election.

*In re Wheatley* (1884) 27 Ch. D. 606; *Hamilton v. Hamilton* [1892] 1 Ch. 396; and *In re Tongue*, ante, p. 390, followed.

*In re Vardon's Trusts* (1885) 31 Ch. D. 275 explained.

*Haynes v. Foster* [1901] 1 Ch. 361 not followed.

## ORIGINATING SUMMONS.

By a post-nuptial settlement dated July 28, 1892, and made between the husband of the first part, the wife's father of the second part, the wife of the third part, and trustees of the fourth part (being a settlement supplemental to a marriage settlement of June 25, 1872, between the same parties), certain funds were settled in trust for the wife for life for her separate use without power of anticipation and after her decease for the husband for life and after the decease of the survivor in trust for the issue of the marriage born during the lives of the husband and wife or the life of the survivor in such shares as the husband and wife should by deed jointly appoint and in default of such appointment as the survivor should by deed or will appoint and in default of such appointment in trust for the children of the

marriage who being sons should attain twenty-one or being daughters should attain that age or marry in equal shares, with the usual hotchpot clause.

The wife died on May 28, 1896, without having exercised the joint power of appointment.

There were only three children of the marriage, namely, the plaintiffs Eleanor and Clare, who were spinsters, and the defendant Dorothy, who was married in 1912, and was still under coverture.

By his will dated November 5, 1896, the husband appointed the settled funds upon the trusts of his residuary trust funds and gave his residuary real and personal estate to his trustees upon trust for sale and conversion and directed them to stand possessed of the proceeds (thereinafter called his residuary trust funds) in trust as to one third part thereof to pay the income to the plaintiff Eleanor for life without power of anticipation and after her death (subject to any appointment of a life interest to her husband in pursuance of a power thereinafter contained) in trust for such of her children or their issue as she should by deed or will appoint and in default of appointment in trust for her children who being male should attain twenty-one or being female should attain that age or marry in equal shares, with the usual hotchpot clause, and as to another third part upon similar trusts for the defendant Dorothy, her husband and issue, and as to the remaining third part upon similar trusts for the plaintiff Clare, her husband and issue.

In the event of a daughter contracting a marriage of which the trustees disapproved the testator empowered them to discontinue payment of the income of her share and to pay the same during her life to any other of his said daughters or their issue in such shares as the trustees in their absolute discretion thought fit.

The testator empowered a daughter except one marrying with the trustees' disapproval to appoint a life interest to any husband surviving her and declared that if any daughter predeceased him or died without leaving a child who being male should attain twenty-one or being female should attain twenty-one or marry her share should accrue to the other daughters' shares.

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ASTBURY J. In the event of a daughter contracting a marriage of which  
1915 the trustees approved the testator empowered them to revoke the  
HARGROVE, trusts and resettle her share upon such trusts for the benefit of  
*In re.* the daughter and her husband and issue as the trustees in their  
HARGROVE absolute discretion thought fit.  
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By a deed poll dated April 24, 1912, the testator in contemplation of the marriage of the defendant Dorothy appointed that after his decease the sum of 2000*l.* part of the settled funds (and in fact more than one third thereof) should be held in trust for the defendant Dorothy absolutely, and on the same day the defendant Dorothy assigned the 2000*l.* to the trustees of her marriage settlement of even date.

The defendant Dorothy was married on April 25, 1912, but had not had any issue.

The testator died on June 19, 1914. The daughters' husbands and possible children born after the testator's death being strangers to the power, the appointment by will, though not void for remoteness, was valid only as to the daughters' life interests, and subject thereto the settled funds went to the daughters in default of appointment. The defendant Dorothy having taken over one third under the deed poll, the plaintiffs took the entire unappointed funds under the hotchpot clause.

In these circumstances the question arose whether the plaintiffs as beneficiaries of the testator's free property were put to their election to take either under or against the will.

On November 20, 1914, the plaintiffs issued this summons to determine this and other points.

*Cunliffe, K.C.*, and *Harman*, for the plaintiffs. The testator obviously intended to make his daughters' interests in his free property inalienable. This is shown both by the restraint on anticipation, which is not confined to coverture, and by the alternative provisions as to forfeiture or resettlement on marriage. The question therefore is whether election is negatived by the testator's intention to impose this restraint on all his daughters or whether the intended restraint must in the event become legally effective, so as in fact to prevent compensation. Election being a question of intention, the former view is obviously

preferable, and it was adopted in the reserved judgment of the Court of Appeal in *In re Vardon's Trusts* (1) and in the reserved judgment of Kekewich J. in *Haynes v. Foster* (2), where all the authorities were considered. These cases show that the intention is paramount, the event immaterial.

*Percy Sanger*, for the executrix. Intention is not the governing factor. The only question is whether the daughters' interests are in fact available for compensation: *Cooper v. Cooper*. (3) The judgment in *In re Vardon's Trusts* (1) must be read with reference to the facts before the Court, namely, restraint on a married woman. The question of spinsters was not considered. In the previous case of *In re Wheatley* (4) Chitty J. drew a distinction between the position of married women and persons sui juris, and the two spinsters in that case were in fact put to election. In *Hamilton v. Hamilton* (5) North J. in a reserved judgment refused to impound a married woman's interest during the existing coverture, but gave liberty to apply at its termination. *Haynes v. Foster* (2) is really inconsistent with these authorities, and if pushed to its logical conclusion the testator's intention would apply to the case of a man, as apparently is suggested towards the end of the judgment. (6) It is disapproved in 1 White and Tudor's Leading Cases, 8th ed. p. 448, and Ashburner on Equity, p. 673, and it was distinguished on very slight grounds in *In re Tongue*. (7) The alternative forfeiture and resettlement clauses clearly do not prevent compensation either in intention or legal effect: *McCarogher v. Whieldon* (8); *Carter v. Silber*. (9) The latter case was reversed on other grounds not touching this point. (10)

*Dighton Pollock*, for the settlement trustees.

*Micklem, K.C.*, and *St. John Clerke*, for Dorothy.

*Attwater*, for Dorothy's trustees.

*Harman* in reply. The considered judgment of Kekewich J. in *Haynes v. Foster* (2) cannot be puffed out by text-writers

(1) 31 Ch. D. 275, 279.

(2) [1901] 1 Ch. 361, 367.

(3) (1874) L. R. 7 H. L. 53, 67,  
70, 71.

(4) 27 Ch. D. 606, 611.

(5) [1892] 1 Ch. 396, 407.

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(6) [1901] 1 Ch. 369.

(7) Ante, p. 390.

(8) (1867) L. R. 3 Eq. 236.

(9) [1891] 3 Ch. 553, 565.

(10) [1892] 2 Ch. 278; [1893]  
A. C. 360.

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ASTBURY J. however eminent. In *In re Tongue* (1) the restraint was only  
 1915 imposed during coverture, so of course it did not apply to  
 HARGROVE, spinsters. In *In re Wheatley* (2) it was admitted that the  
*In re.* spinsters must elect, so that the question was not argued.  
 HARGROVE *Hamilton v. Hamilton* (3) is fully dealt with in *Haynes v.*  
*v.* *Foster.* (4)  
 PAIN.

ASTBURY J. (after stating the facts). It is not contested that unless the question of election is excluded by the testator's will it arises in the case of Eleanor and Clare, who take the settled funds in default of appointment, Dorothy having received over one third on her marriage.

Eleanor and Clare, who were spinsters both at the date of the will and at the testator's death and are so still, contend that they are not put to their election, first, because the will restrains them from anticipation and, secondly, because the trustees have power to determine their interests if they contract a marriage of which the trustees disapprove or to revoke the trusts and resettle their shares on an approved marriage.

On the first point, namely, whether a restraint on anticipation in terms attached to a spinster's income precludes election, there is conflicting authority.

In *In re Vardon's Trusts* (5), where a marriage settlement settled a fund for the separate use of the wife for life with restraint on anticipation, and contained a covenant by the wife (then an infant) to settle future property, it was held by the Court of Appeal (reversing the judgment of Kay J.) that the wife could not be compelled to elect between after-acquired property and her interest in the settled fund, but was entitled to retain both. In their reserved judgment the Court of Appeal said: "Mrs. Walker contends that she is entitled to retain the benefit under the settlement because it is income settled to her separate use free from the power of anticipation: and that she is entitled to the benefit given to her by her brother's will because the will which gives it to her is operative, and the covenant which would

(1) Ante, p. 390.

(3) [1892] 1 Ch. 396.

(2) 27 Ch. D. 606, 611.

(4) [1901] 1 Ch. 361, 368.

(5) 31 Ch. D. 275, 279.

take it away from her is inoperative. As she was an infant at the time of the execution of the settlement and of the marriage, it is evident that her contention must prevail unless she can be reached by the doctrine of election. That doctrine rests, not on the particular provisions of the instrument which raises the election, but on the presumption of a general intention in the authors of an instrument that effect shall be given to every part of it, 'the ordinary intent,' to use the words of Lord Hatherley (*Cooper v. Cooper* (1)), 'implied in every man who affects by a legal instrument to dispose of property, that he intends all that he has expressed.' This general and presumed intention is not repelled by showing that the circumstances which in the event gave rise to the election were not in the contemplation of the author of the instrument (*Cooper v. Cooper* (1)), but in principle it is evident that it may be repelled by the declaration in the instrument itself of a particular intention inconsistent with the presumed and general intention. For example, if the settlement in question had contained an express declaration that in no case should the doctrine of election be applied to its provisions, there seems to be no reason why such a declaration should not have full effect given to it. The late Mr. Swanston appears to us to have correctly enunciated the law on this point, when he said: 'The rule of not claiming by one part of an instrument in contradiction to another, has exceptions; and the ground of exception seems to be, a particular intention, denoted by the instrument, different from that general intention, the presumption of which is the foundation of the doctrine of election.' (2) . . . . What is the force and effect of this restraint on anticipation? It provides that nothing done or omitted to be done by Mrs. Walker at any given time shall deprive her of the right to receive from the trustees the next and every succeeding payment of the income of the fund as it becomes due. But if she be put to her election, and if by her election she deprives herself of the right to receive subsequent payments of the income until her husband and children are compensated, it follows that she has by the act of election, or by the default in performing her covenant, deprived herself of the benefit of the income in the way of anticipation,

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(1) L. R. 7 H. L. 71.

(2) 1 Swans. 404, n.

ASTBURY J. which is the very thing which the settlement declares that she cannot do. This settlement, therefore, in our judgment, contains a declaration of a particular intention inconsistent with the doctrine of election, and therefore excludes it."

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*In re.*  
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Now in that case the question as to the effect of a restraint on anticipation in terms imposed on a lady who was a spinster both at the date of the will and at the testator's death was not in question. The Court of Appeal merely decided that a restraint on anticipation prevented a married woman being put to election.

In *In re Wheatley* (1) Chitty J. drew a distinction between the position of a married woman where the restraint was operative and that of a spinster where it was merely prospective. In that case the five persons who were prima facie put to election were the children of John Wheatley, namely, a son, two spinster daughters, and two married daughters. Chitty J. said: "I say, prima facie, because I think there is a distinction between the case of those who are sui juris and that of the two married women." In other words he assented to the view that the fact that the testator had attached the same restraint on anticipation in terms to the spinsters' interests was not sufficient to prevent their being put to election.

In *Hamilton v. Hamilton* (2) the facts were a little more complicated. An ante-nuptial settlement made in 1879 when the wife was an infant contained a covenant by the husband and wife to settle her after-acquired property. The wife was (inter alia) given certain life interests without power of anticipation. She was divorced. She brought an action to avoid the covenant. Before trial she married again. North J. in a reserved judgment declared that if she elected to avoid the covenant, her interests in other property under the settlement ought to be impounded to compensate those who lost by her election; but that the declaration was not to apply during the existing coverture to the income she was restrained from anticipating. He gave the defendants liberty to apply on the termination of the existing coverture, showing that in his view the protection against compensation given by the restraint on anticipation was only operative during the coverture in fact in existence.

(1) 27 Ch. D. 606, 611.

(2) [1892] 1 Ch. 396, 407.

The plaintiffs rely on *Haynes v. Foster*. (1) A testator directed his Turkish land to be sold and the proceeds treated as part of his residuary estate. He gave an interest in his residuary estate to a married daughter coupled with a restraint on anticipation. He had no power to bequeath the proceeds of his Turkish estates, and a fourth share descended on the married daughter. The estates were sold and the proceeds paid into Court, and pending an application for payment out the married daughter became a widow. Kekewich J. in a reserved judgment in which he went through the authorities, including *In re Wheatley* (2), *In re Vardon's Trusts* (3), and *Hamilton v. Hamilton* (4), held that by adding the restraint on anticipation the testator had shown an intention inconsistent with the application of the doctrine of election, which intention was not affected by the fact that the married daughter had subsequently become discoverd, and therefore she was not put to her election. He said: "If then Lady Lacon were still a married woman, it would follow that the restraint on anticipation of her interest in the residue renders it impossible for her to make compensation thereout, and excludes the doctrine of election. But then it is urged that, she being now discoverd, the restraint has ceased to exist, and compensation is therefore possible. If I am right in the view which I have taken of Chitty J.'s decision in *In re Wheatley* (2) and of the decision of the Court of Appeal in *In re Vardon's Trusts* (3), it matters not whether Lady Lacon is now discoverd or no. You must look to the will to ascertain what the testator's intention was, and if the testator has said that he intends her not to be capable of alienating her interest, that is, to be incapable of making that compensation thereout which the doctrine of election requires, then, because he has expressed that intention, the doctrine of election is excluded."

Now in that case Lady Lacon was a married woman at the date of the will and at the testator's death, and the testator had imposed a restraint which in ordinary circumstances would operate at his death. I think Kekewich J. was right when he said that the testator intended her—a married woman—to

(1) [1901] 1 Ch. 361, 367.

(3) 31 Ch. D. 275.

(2) 27 Ch. D. 606, 611.

(4) [1892] 1 Ch. 396, 407.

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ASTBURY J. be incapable of alienating her interest for any purpose which would prevent her making thereout compensation on election, but I find a difficulty in seeing how the testator's intention that a married woman should be restrained from anticipation implies any intention that after discovery she should be subject to a restriction unknown to the law, and I do not understand how *In re Wheatley* (1) assists any such view, seeing that Chitty J. expressly distinguished the case of persons sui juris from that of married women in this respect. Nor does *In re Vardon's Trusts* (2) in my opinion cover that point, as the Court of Appeal merely decided that a restraint on anticipation prevented a married woman electing. There is another passage in the judgment in *Haynes v. Foster* (3) dealing with the testator's presumed intention in imposing a restraint on anticipation or alienation, and distinguishing presumed intention and legal effect, which I am unable to agree with; I am unable to reconcile this decision with the reasoning and effect of the three decisions previously referred to.

The real meaning of the decision and the observations in *In re Vardon's Trusts* (2) is I think that the will must be looked at to ascertain the character of the interest the testator intended to create. If he intended to create an interest of such a character as would have the legal effect of inter alia preventing the beneficiary making provision for compensation under the doctrine of election, and the interest so created is not available in law for compensation when the time comes for making election, then the doctrine of election is excluded because the testator has created in fact an interest of that character, which is not so available, although the question of election was obviously not in his contemplation.

In *In re Tongue* (4) a testatrix bequeathed certain Australian stock (really belonging to her four daughters) to her brother's children and gave the residue of her estate to trustees for her four daughters (naming them) in equal shares. She then settled each daughter's share upon trust for the daughter for life with a restraint on anticipation "if and while she shall be under coverture." At the testatrix's death three daughters were

(1) 27 Ch. D. 606, 611.

(3) [1901] 1 Ch. 369.

(2) 31 Ch. D. 275.

(4) Ante, pp. 390, 394.

married, and one was a spinster. It was admitted on the authority of *In re Wheatley* (1) that the married daughters were not put to election, and the only question was whether the spinster daughter was put to election. Warrington J. said: "As to the daughter who is still a spinster . . . I should have felt no difficulty at all. I should have considered that the fact that she would be restrained from anticipation if and when she married would be immaterial, and that inasmuch as she was now capable, at the time when the right to compel election has arisen, of disposing of her interest under the will, there is no expresssion of intention on the part of the testatrix inconsistent with her being compelled to make that election. But a difficulty is created by the judgment of Kekewich J. in *Haynes v. Foster*." (2) There, however, "the learned judge founded his judgment . . . on the assumption that the testator in that case had no idea of confining the restraint to the period of coverture only," and on that narrow point he distinguished the case.

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*In re*.  
HARGROVE  
v.  
PAIN.

In the present case the spinster daughters are not yet subject to any restraint on anticipation and are free to deal with their interests as they desire. The imposition of a mere future restraint on anticipation is no bar to their doing so, and does not therefore prevent the doctrine of election from applying to them having regard to the judgments and reasoning in *In re Wheatley* (1), *In re Vardon's Trusts* (3), and *Hamilton v. Hamilton*. (4)

The two provisoes enabling the trustees to terminate their interests in one event or resettle them in another event fall within the same principle. They do not show any intention that until one of those events happens the daughters are not properly free to deal with their income as they feel disposed, nor do they prevent them in law from doing so, and on that ground they do not prevent the doctrine of election from applying in the case of the plaintiffs. The spinster daughters are therefore in my judgment put to their election.

Solicitors: *Withers, Bensons, Birkett & Davies; J. Clement Brown, for R. C. & S. Burrows, Cambridge.*

(1) 27 Ch. D. 606.

(2) [1901] 1 Ch. 361.

(3) 31 Ch. D. 275.

(4) [1892] 1 Ch. 396, 407.

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Jan. 19.

*In re* LAWES-WITTEWRONGE.MAURICE *v.* BENNETT.

[1914 L. 1109.]

*Will—Construction—Indefinite Gift of Net Profits of Commercial Undertakings  
—Shares in Limited Company—Advances—Interest in Partnership.*

Testator bequeathed to a legatee one fifth share of the "net profits in all my commercial undertakings, being John Bennett Lawes & Company, Limited, the Millwall Rubber Company, Limited, and the X Rubber Company."

The first two undertakings were limited companies in each of which the testator held shares and to each of which he had made advances. The third was a verbal partnership two third shares in which belonged to the testator. Since his death the terms had been reduced to writing, under which his executors were to carry on the partnership business and were to receive two thirds of the profits till sale and two thirds of the purchase-moneys on sale of the partnership assets :—

*Held*, that the legatee was not entitled to any part of the advances made by the testator.

*Held*, also, that, as to the testator's shares in the two limited companies, the rule that a gift of income without any limit of time is equivalent to a gift of the capital applied, and that the legatee was entitled to one fifth part of the testator's shares.

*Held*, also, that, as to the testator's interest in the partnership, that rule was inapplicable, and that the legatee was only entitled to one fifth share of the net profits receivable by the executors while the partnership business was being carried on, and not to any share of the partnership assets.

## ADJOURNED SUMMONS.

Sir Charles Lawes-Wittewronge, who died on October 6, 1911, by his will, dated August 23, 1907, appointed four persons his executors and trustees, and disposed of his real and personal property as therein mentioned. The testator made two codicils to his will, the second of which, dated the day before his death, was as follows: "I also make this further addition to my codicil and leave one fifth share of the net profits in all my commercial undertakings, being John Bennett Lawes & Company, Limited, the Millwall Rubber Company, Limited, and the X Rubber Company to Charles Maurice, Manton Grange, Marlborough, Wilts."

John Bennett Lawes & Company was a limited company in which the testator was a large shareholder. He was also a

creditor of the company for advances amounting to 8540*l.*, and also held a debenture for 16,000*l.* of the company and the lease of their premises as security for overdrafts which he or his late father (to one moiety of whose estate the testator became entitled) had guaranteed. This company had at one time earned large profits, but for some years prior to and at the date of the testator's death the company was carrying on business at a loss. In March, 1910, Charles Maurice was appointed one of the directors, and in February, 1911, he was appointed managing director of the company. According to his evidence Charles Maurice had assisted the testator in financing the company, and had both before and after his death largely succeeded in improving its condition. The company's business had since been made over to certain purchasers, the transaction being carried out through the purchase by them of all the shares of the company, they undertaking to discharge all the liabilities of the company. As the result of this transaction the executors had been repaid the 8540*l.* loan and released from the guarantees (the debenture for 16,000*l.* and the lease being delivered up by them), and had received 684 second debentures of 7*l.* each of the company and a sum of 2833*l.* 3*s.* 7*d.* cash in respect of the shares held by the testator.

The Millwall Rubber Company was a limited company in which the testator held nearly the whole of the share capital. He was also a creditor of the company for advances amounting to 25,000*l.*, as security for which he held a debenture of the same amount. Some three weeks after the testator's death the company went into voluntary liquidation, and a receiver had been appointed of its undertaking and property.

In connection with the Millwall Rubber Company the testator shortly before his death entered into a verbal partnership with L. J. Arthur, F. W. East, and R. G. East (hereafter referred to as the inventors) for the exploitation of an invention for a pump in respect of which letters patent were subsequently obtained. The partnership so constituted was known as the X Rubber Company, the third undertaking referred to in the codicil. The testator verbally made himself responsible for the debts of this partnership on the understanding that two thirds of

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the assets of the partnership should belong to him and one third to the inventors. The testator also made an advance of 1485*l.* on account of the partnership. After the testator's death his executors advanced out of his estate a further sum of 800*l.* to the X Rubber Company, and an agreement dated July 17, 1912, was made between the executors of the one part and the inventors of the other part, and approved by the Court in proceedings taken for that purpose, with a view, as therein recited, to settle and define the respective interests of the executors and the inventors in the X Rubber Company and its assets, and to place upon record the interests of the parties. Under this agreement the assets of the company were defined as consisting of the goodwill of the business, all rights in respect of the invention and patents, machinery, supplies of rubber, and all other property of the company, and it was provided that the executors should be entitled to be reimbursed out of the assets the said sums of 1485*l.* and 800*l.*, and that subject thereto profits should belong as to two thirds to the executors and as to one third to the inventors, while losses should be primarily payable out of the assets and subject thereto borne by the executors. The executors were also empowered to sell the assets, the purchase-moneys, after payment of the said sums of 1485*l.* and 800*l.*, to belong as to two thirds to the executors and as to one third to the inventors. The business in the meantime was to be carried on by the executors, and to be superintended, if the executors so desired, but not otherwise, by the inventors.

This was an originating summons taken out by Charles Maurice against the executors and trustees of the testator's will asking that the interests of the plaintiff under the second codicil might be ascertained, and in particular whether he was entitled to any and what share and interest in (*a*) the sum of 8540*l.* advanced by the testator to John Bennett Lawes & Company and since repaid to his executors; (*b*) the second debentures and cash received by the executors in respect of the testator's shares in the same company; (*c*) the sum of 25,000*l.* advanced by the testator to the Millwall Rubber Company; and (*d*) the testator's share in the partnership carried on as the X Rubber Company.

*Clauson, K.C.*, and *Ashworth James*, for the plaintiff. The unlimited gift of a portion of the testator's net profits in these undertakings amounts to a gift of a corresponding portion of his shares in the two companies and of his interest in the assets of the partnership. The general rule that an unlimited gift of income carries the capital is well settled: *Hawkins on Wills*, 2nd ed. p. 162, citing *Adamson v. Armitage* (1); and there is no reason why the rule should not apply to shares in a limited company or to the capital and assets of a private partnership.

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[WARRINGTON J. A share of profits in a private partnership does not necessarily bear any relation to capital.]

It is not possible to split up the profit-producing items into distinct portions, and the gift of a share of net profits is equivalent to a gift of a corresponding share of the entire assets of the partnership. As to the 8540*l.* loan repaid by John Bennett Lawes & Company and the 25,000*l.* secured by the debenture of the Millwall Rubber Company, one fifth share of these sums ought to be treated as comprised in the bequest under the peculiar circumstances of the present case. The true meaning of the testator, judged by the surrounding circumstances, was that the plaintiff should do his best to get back all moneys sunk by the testator in these companies, whether in the form of shares, debentures or loans, and that he should be entitled to receive one fifth of the whole amount which he succeeded in so recovering.

*H. Terrell, K.C.*, and *H. C. Bischoff*, for the executors, were not called on to argue as to the two sums of 8540*l.* and 25,000*l.* The expression "net profits" as applied to these undertakings is ambiguous, but, even if it is referable to the profits earned by them as going concerns, it does not comprise any part of the testator's shares in the two limited companies, and still less does it comprise any part of his share in the assets of the partnership. The bequest should be limited to a share of the net profits earned in carrying on the undertakings previous to a winding-up or sale. The general rule that an indefinite gift of income carries the capital is easily displaced: *Blann v. Bell* (2),

(1) (1815) 19 Ves. 416, 418.

(2) (1852) 5 De G. & Sm. 658, 663; on appeal 2 D. M. & G. 775.

WARRINGTON J. where Parker V.-C. refers to the rule as one applying to the  
“income of a fund.”

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WARRINGTON J. The question in this case turns on the meaning and effect of a very few words in the second codicil to the will of the testator. [His Lordship read the bequest and stated the facts as to the testator's interest in the three undertakings and continued:] What is the meaning and effect of those words in this codicil? To deal in the first place with the testator's interest in John Bennett Lawes & Company and the Millwall Rubber Company, the expression “share of the net profits” cannot in my opinion include moneys owing to the testator as a creditor. I think that the expression “one fifth share of the net profits” means “one fifth share of that which I receive from the net profits made by these undertakings,” a share of the fund produced by the businesses after deducting the liabilities and expenses. In my opinion, therefore, the plaintiff is not entitled to any part of the two loans of 8540*l.* and 25,000*l.* or of the debenture of the Millwall Rubber Company.

Leaving the X Rubber Company to be dealt with separately, I have now to deal with the testator's remaining interests in the two limited companies—his holdings of shares in those companies. What is the effect of the gift of a share of the net profits? It is an undoubted rule of law, or rather perhaps of construction, that a gift unlimited in point of time of the income of a fund is a gift of the fund itself, and the reason is obvious, for it would be absurd to say that the income arising from a fund was for all time to be paid to one person while the corpus of the fund was to belong to some one else. What I have to consider is whether the rule is applicable to the case of dividends derived by a shareholder from shares in a limited company. I can see no reason why it should not be. Dividends arising from a share in a limited company are the fruit of the share, and therefore a gift unlimited in time of the dividends on a share in a company is as much a gift of the share as a gift of the income of a sum of Consols is a gift of the sum itself. In the present case I find a gift of the testator's net profits in John Bennett Lawes & Company and the Millwall Rubber Company.

What can a gift of "net profits" in a limited company mean except a gift of that which the testator was entitled to receive on his shares in the company? A shareholder is entitled to the dividends which are duly declared according to the articles of association of the company, and therefore a gift of the profits of shares amounts to a gift of the dividends on them, and that amounts to a gift of the corpus of the shares.

Since the testator's death his interest in John Bennett Lawes & Company has been sold, and the plaintiff is accordingly entitled to one fifth of the purchase-moneys and second debentures now representing that interest, and also one fifth of the testator's share holding in the Millwall Rubber Company.

The case of the X Rubber Company is peculiar. That is a partnership firm, not a limited company. I cannot see how the net profits of a share in a partnership can come under the rule to which I have referred. The net profits of a partnership business are not the fruit of the capital employed in the business alone, but are the result of the employment of the capital and of the exertions of the partners as well; moreover, a partner's share of the profits may, and often does, bear no relation to the share in which he is interested in the capital of the partnership. In my opinion, therefore, the rule does not apply to a gift of a share of the net profits of a partnership, and such a gift does not entitle the legatee to a share in the corpus of the assets; but the words of the gift must have some meaning and effect given to them, and in my opinion the true meaning is that the legatee, his executors, administrators or assigns, are entitled to receive one fifth share of that part of the net profits which would otherwise have been payable to the executors of the testator so long as the partnership business is being carried on.

Solicitors: *Waltons & Co.; Bischoff & Co.*

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SARGANT J. *In re* BERNA COMMERCIAL MOTORS, LIMITED.

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[1914 B. 2579.]

Jan. 14.

*Trade Mark—Registration—Special Application—Distinctive Word—Geographical Name in Foreign Language—Vendor and Purchaser of Goodwill—Right to apply—Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9, sub-s. 5; s. 22.*

The word "Berna," though it is the name of the capital of Switzerland in the Italian and Spanish languages, is not incapable of registration under the Trade Marks Act, 1905, s. 9, sub-s. 5, in connection with the business of manufacturers of motor vehicles in the United Kingdom.

It is no objection to such an application that the goodwill of the original business, including the right to the use of the name, has become divided between three distinct sets of owners: (1.) in the United Kingdom, (2.) in British colonies, and (3.) in foreign countries.

As between vendor and purchaser of the goodwill of the business such an application should be made by the purchaser and not by the vendor on the purchaser's behalf.

#### MOTION.

This was a special application under s. 9, sub-s. 5, of the Trade Marks Act, 1905 (1), by the Berna Commercial Motors, Limited,

(1) Trade Marks Act, 1905, s. 9:  
"A registrable trade mark must contain or consist of at least one of the following essential particulars:—

"(1.) The name of a company, individual, or firm represented in a special or particular manner;

"(2.) The signature of the applicant for registration or some predecessor in his business;

"(3.) An invented word or invented words;

"(4.) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname;

"(5.) Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs (1.), (2.), (3.), and (4.), shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark;

"Provided always that any special or distinctive word or words, letter, numeral, or combination of letters or numerals used as a trade mark by the applicant or his predecessors in business before the thirteenth day of August one thousand eight hundred and seventy-five, which has continued to be used (either in its original form or with additions or alterations not substantially affect-

an English company, for the registration of the word "Berna" as SARGANT J. a trade mark in class 22 in respect of motor cars and chassis for conveyance of goods and other commercial purposes.

In 1902 the business was started by a Swiss company. In 1908 the business was transferred to the applicants, who alone carried on the entire business down to 1912. In that year the applicants disposed of their business outside the United Kingdom and British colonies and dependencies to a new Swiss company.

In 1913 the applicants, under an agreement in writing, dated January 7, 1913, agreed to sell their business in the United Kingdom, including the exclusive right to the use of the word "Berna," so far as the same related to the manufacture of motor vehicles in the United Kingdom, to the British Berna Motor Lorries, Limited, an English company, the applicants still retaining their business in British colonies and dependencies in their own hands, but covenanting not to carry on a similar business in the United Kingdom. No actual assignment to the British Berna Motor Lorries, Limited, had yet been executed, but they were carrying on the business in the United Kingdom under the agreement for sale. There was a large body of evidence showing that the word "Berna" had for several years past come to mean the goods of the applicants.

It was stated that the word "Berna" was both the Italian and the Spanish name for Berne, the capital of Switzerland. The

ing the identity of the same) down to the date of the application for registration shall be registrable as a trade mark under this Act.

"For the purposes of this section 'distinctive' shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons.

"In determining whether a trade mark is so adapted, the tribunal may, in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed

to be registered."

Sect. 22: "A trade mark when registered shall be assigned and transmitted only in connection with the goodwill of the business concerned in the goods for which it has been registered and shall be determinable with that goodwill. But nothing in this section contained shall be deemed to affect the right of the proprietor of a registered trade mark to assign the right to use the same in any British possession or protectorate or foreign country in connexion with any goods for which it is registered together with the goodwill of the business therein in such goods."

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SARGANT J. works of the Swiss company were situated at Olten, some forty miles from Berne.

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In November, 1913, the British Berna Motor Lorries, Limited, commenced an action against John Yarwood & Co., for an injunction to restrain them from selling or advertising motor lorries under the name of "Berna," and to that action the present applicants were also made nominal defendants. The present application stood over pending the trial of that action, which came on for trial before Sargant J. and was ultimately settled on terms under which the defendants John Yarwood & Co. submitted to an injunction.

The present application was opposed by the Registrar of Trade Marks, and as a preliminary point,

*Austen-Cartmell*, for the Registrar, submitted that as a matter of form the application ought to be amended by substituting the British Berna Motor Lorries, Limited, for the present applicants. The present applicants have parted with the goodwill of their business in the United Kingdom and are now really seeking to register a trade mark in gross. Form No. 5 to the Trade Marks Rules, 1906, does not contemplate an application by the vendor of a goodwill for registration of a trade mark connected with it on behalf of the purchaser.

*L. B. Sebastian*, for the applicants. There is no difficulty in making the amendment if necessary.

SARGANT J. The application had better be amended in the way suggested.

*L. B. Sebastian*, for the applicants. The word "Berna" in this connection is a "distinctive mark," that is to say adapted to distinguish the applicants' goods from those of other persons. It is open to the Court to come to this conclusion without any evidence at all, but the evidence in the present case puts it beyond all doubt. It is said that being a geographical name in the Italian and Spanish languages the word is incapable of being appropriated by a trader as descriptive of his goods, but the word "Berna" is not "according to its ordinary signification a geographical name." It has no such meaning to the ordinary Englishman, and, even if it had, it has on the evidence acquired

a secondary meaning in connection with motor vehicles of the applicants' manufacture. A geographical name as such does not stand on the same footing as a laudatory epithet and is capable of registration under s. 9, sub-s. 5. The present case is covered by the decision of Parker J. in *In re Itala Fabbrica di Automobili*. (1)

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*Austen-Cartmell*, for the Registrar. First, the word "Berna" as the Italian and the Spanish name for the capital of Switzerland is not a fit word for registration any more than "Berne," the French, or "Bern," the German name. For the purposes of registration in the United Kingdom names of well-known cities in whatever language are inherently incapable of registration. It makes no difference whether the name is "Antwerp" or "Anvers," "London" or "Londres," "Berne," "Bern," or "Berna." If that is so, then no amount of user showing that the name has in fact become appropriated to the applicants' goods can make any difference: *In re Leopold Cassella & Co.* (2)

[SARGANT J. Laudatory epithets are no doubt entirely excluded. But is that the case with all geographical names?]

There may be distinctions, but all names of well-known cities are entirely excluded. The examples put by Fletcher Moulton L.J. in *In re Joseph Crosfield & Sons* (3) of "Monte Rosa" as applied to cigarettes and "Teneriffe" as applied to boiler plates are distinguishable, as those names could not be indicative of the place of manufacture. In *In re California Fig Syrup Co.* (4) the application was to register the four words "California Syrup of Figs." The decision in *In re Itala Fabbrica di Automobili* (1) is not altogether consistent with Lord Parker's own speech in *Registrar of Trade Marks v. W. & G. Du Cros* (5), but in any case it did not there appear that "Itala" was a geographical name. A geographical name is not *prima facie* distinctive: *In re R. J. Lea's Application*. (6) [He also referred to the decision of the Court of Appeal in *W. N. Sharpe, Ltd. v. Solomon Brothers*. (7)]

(1) (1910) 27 Rep. Pat. Cas. 493.

(2) [1910] 2 Ch. 240.

(3) [1910] 1 Ch. 130, 144.

(4) [1910] 1 Ch. 130.

(5) [1913] A. C. 624, 633.

(6) [1913] 1 Ch. 446, 452, per Farwell L.J.

(7) (1914) Since reported in 32 Rep. Pat. Cas. 15, C. A., reversing S. C., 31 Rep. Pat. Cas. 441.



SARGANT J. Secondly, in the existing facts the word is misleading, as it implies that the goods are made in Switzerland, whereas they are made in England.

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Thirdly, however the matter might have stood if one company had been the owner of the entire business, the case is altered by the division of the original business into three separate businesses with three separate owners in the United Kingdom, British colonies, and foreign countries respectively. If, for instance, the purchaser of a Swiss car brought it to England, it would be a "Berna" car, though not made in this country. *Bowden Wire v. Bowden Brake Co.* (1) is distinguishable on this point, as there the two businesses were carried on in this country.

*L. B. Sebastian* in reply referred on the third point to s. 22 of the Trade Marks Act, 1905.

SARGANT J. This is an application made under the concluding words of sub-s. 5 of s. 9 of the Trade Marks Act, 1905, by the Berna Commercial Motors, Limited, for the registration of the word "Berna" as a trade mark in connection with commercial motor cars. The application was made some time ago, but it necessarily stood over in consequence of somewhat heavy litigation which was taking place with reference to the use of the name "Berna." In that litigation, which took place before me, the applicants were successful and certain persons who had been using the name "Berna" in connection with motor cars were restrained from so doing. The application is now renewed and is opposed by the Registrar of Trade Marks. The business of manufacturing these cars appears to have been started in Switzerland in 1902 at Olten in the canton of Solothurn, which appears to be about forty miles from the city of Berne. In 1908 the applicants, the Berna Commercial Motors, Limited, were incorporated in England and took over the entire business of the Swiss company which had previously manufactured these motors. There had in fact been a prior intermediary company called the Berna Motors, Limited, but from 1908 to 1912 the applicants were the only persons carrying on this business in any part of the world and were selling their goods in Switzerland, the United Kingdom,

(1) (1913) 30 Rep. Pat. Cas. 580.

British colonies and dependencies and foreign countries. In 1912 the Berna Commercial Motors, Limited, sold their business in foreign countries, but not in the colonies or dependencies of the British Empire, to a new Swiss company incorporated for the purpose of carrying on business at Olten, the original place of manufacture; and on January 7, 1913, the Berna Commercial Motors, Limited, sold their business in the United Kingdom to the British Berna Motor Lorries, Limited, together of course with the benefit of all trade names and trade marks, but the vendors retained their business in British colonies and dependencies. Under these circumstances I think it right that the application should be amended by substituting for the Berna Commercial Motors, Limited, the British Berna Motor Lorries, Limited, who are the persons entitled to the goodwill of the manufacturing business within the United Kingdom and the right to use in the United Kingdom the trade marks belonging to the present applicants.

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The application is opposed by the Registrar of Trade Marks upon three grounds—the first and most important ground being this. It is said that the word “Berna” is totally incapable of distinguishing the manufactures of the applicants, because it is the Italian and Spanish name for the town of Berne, and Mr. Austen-Cartmell put his case as high as this, that no amount of evidence whatever its extent showing the identification of the name “Berna” with the manufactures of the applicants in the United Kingdom could possibly get rid of that inherent disqualification in the name. In my opinion that contention is putting the case a great deal too high. In the first place, to myself at any rate, it was news that the word “Berna” stood for the Spanish or Italian equivalent of Berne. I had the advantage of a three or four days’ hearing of the litigation to which I have already referred, and it never dawned upon me that the word bore any such signification. Whether I thought that it had some connection or other with Berne, I am not sure; I am rather under the impression that I did, but certainly there seems to me to be nothing whatever in the name to identify it absolutely with the town of Berne, and even if that were so, I cannot think that there is in the Trade Marks Act, 1905, anything to absolutely

SARGANT J. disqualify the use of the geographical name "Berna" in connection with motors. Certainly some geographical names can be registered in connection with goods. The examples given by Fletcher Moulton L.J. in *In re Joseph Crosfield & Sons* (1) of "Monte Rosa" in connection with cigarettes, or "Teneriffe" in connection with boiler plates, are sufficient illustrations. It is quite clear that the Trade Marks Act, 1905, does contemplate the registration of certain geographical names, and I cannot see that geographical names are in themselves put in the same category of qualification or disqualification as laudatory epithets. The latter, in my opinion, are in a totally different class, because necessarily they cannot have acquired a simple secondary signification and also because it must always be open to tradesmen to apply laudatory epithets to their own goods, and it would be monstrous to deprive them of the privilege of so describing their goods in competition with rival traders. But I by no means intend to say that all geographical names are necessarily proper to denote goods. For instance, it would be hopeless to apply for the registration of "Leicester" in connection with boots or of "Burton" in connection with ales.

Now the name "Berna" not being in my judgment one that is absolutely prohibited, I am clearly entitled to take into account what has happened with regard to its actual use. There is a special proviso to s. 9 of the Act which says that "In determining whether a trade mark is so adapted, the tribunal may, in the case of a trade mark in actual use"—which is the present case—"take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered." In the present case I have a large body of evidence by people of unquestionable position and obviously well entitled to speak with regard to the subject-matter, which in my opinion shows conclusively that the term "Berna" has at any rate for the last four or five years come to mean the goods of the applicants exclusively, excepting of course the slight user which was made of that term by the defendants who were restrained from any further use in the action to which I have already referred, and

(1) [1910] 1 Ch. 144.

such further slight user as may have taken place by or on behalf SARGANT J. of the British Berna Motor Lorries, Limited, the recent purchasers of the goodwill of the English business and of the trade marks connected therewith. So far, therefore, as concerns the first objection taken by the Registrar, I am of opinion that the term "Berna" is properly distinctive of the motors of the applicants and that the registration ought to proceed.

The second objection is that the word "Berna" implies that the motors are made in Switzerland and is therefore misleading and deceptive. I think that my previous observations with regard to the meaning of the word really dispose of that contention, but more than that, I am unable to see that the application of a geographical name to articles which are not made at the place in question necessarily renders it a misleading or deceptive name. It may in certain cases have this result, but not in all, and certainly in my opinion it does not render the word misleading or deceptive in the present case.

A third objection is taken, namely, that the term "Berna," though originally descriptive of the goods of the present applicants throughout the world, has ceased to be so descriptive in the United Kingdom because the original owners of the entire business have sold their foreign business to a second company while retaining in their own hands their colonial business. That objection is one which, if it were to prevail, would in my judgment unduly hamper and prejudice a very large number of ordinary transactions and would cause the owner of any business in more than one country to lose by the sale of his foreign business the benefit of his trade names and trade marks altogether. I am quite unable to accede to that argument, and Mr. Sebastian has called my attention very properly to s. 22 of the Trade Marks Act, 1905, which in terms recognizes the division of businesses and the assignment of the right to use a trade mark in any British possession or foreign country. In my opinion, therefore, the second and third points also fail, and I direct the Registrar to proceed with the application.

Solicitors: *Theodore Roberts ; Solicitor to the Board of Trade.*

A. C.

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Jan. 26.

In re ARBUTHNOT.ARBUTHNOT *v.* ARBUTHNOT.

[1914 A. 767.]

Will—Construction—Hotchpot Clause—Moneys covenanted to be paid in certain Events to be brought in “in default of any direction to the contrary in writing”—Annual Allowance covenanted to be paid in Settlement directing that the same is not to be taken in satisfaction of Donee’s Share under Will.

Under a will and codicil children of the testator were given shares in his residuary estate. The will provided that moneys which the testator had given or covenanted to give to any child “on his or her marriage or otherwise for his or her advancement or establishment in life” should “in default of any direction to the contrary in writing under my hand” be taken in or towards satisfaction of the child’s share and “brought into hotchpot and accounted for accordingly.” On the subsequent marriage of a child, testator, in the child’s marriage settlement, covenanted to pay to the settlement trustees an annual sum of 300*l.* during the joint lives of himself and other persons, and by the settlement declared that the sums payable under the covenant should “not be taken in satisfaction of any share” which the child might take in the testator’s residuary estate under his will. Testator afterwards made a second codicil confirming his will:—

Held, (1.) that the hotchpot clause was not invalid as being in conflict with the Wills Act, 1837, inasmuch as its words might be reasonably construed as requiring to be brought into hotchpot only sums answering a particular description, namely, sums advanced free of certain conditions; (2.) that the moneys paid under the covenant had a condition attached to them and were not subject to the hotchpot clause; and (3.) that this construction was made clearer by the second codicil.

Quære, whether an allowance such as was covenanted to be paid is within a hotchpot clause in the form before the Court.

WILLIAM REIERSON ARBUTHNOT, by his will, dated August 28, 1903, gave his residuary estate, after a life interest to his wife, “in trust for all or any my children or child who, being a son or sons, have attained or shall attain the age of twenty-one years, or, being a daughter or daughters, have attained or shall attain that age or have married or shall marry, if more than one in equal shares. Provided always and I declare that if any child of mine shall have died in my lifetime (whether before or after the date of this my will), leaving issue living at my death, such issue, being male and attaining the age of twenty-one years or

being a female and attaining that age or marrying, shall take by substitution, if more than one in equal shares, the share in the trust premises which such deceased child of mine would have taken under the trusts in that behalf hereinbefore declared, had he or she survived me and attained a vested interest, but so that no issue remoter than a child of such deceased child shall take except in the case of the death in my lifetime of his, her, or their parent and in the place of such parent. Provided always and I declare that all sums of money or property which I have given or covenanted or agreed to give, or which I may hereafter give or covenant or agree to give to or with any child of mine on his or her marriage or otherwise for his or her advancement or establishment in life shall, in default of any direction to the contrary in writing under my hand, be taken in or towards satisfaction of the share of such child in the said trust premises, and shall be brought into hotchpot and accounted for accordingly."

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 ARBUTHNOT,
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The testator made a codicil to his will, dated April 11, 1911, which is not material to this report. A settlement dated April 25, 1911, made on the marriage of his son Kenneth W. Arbuthnot to Janet E. S. Wemyss, contained, in clause 10 thereof, the following covenant:—

"The said William Reiersen Arbuthnot hereby covenants with the trustees hereinbefore named and with each of them, and also as a separate covenant with the husband, that, if the said intended marriage shall be solemnized within six calendar months from the date hereof, he, the said William Reiersen Arbuthnot will, during so much of the joint lives of himself and his present wife and the life of the survivor of them as the husband and the wife or either of them shall be living, pay to the trustees or trustee the annual sum of 300*l.*, such annual sum to commence from the day of the solemnization of the said intended marriage and to be deemed to accrue due from day to day but to be paid by equal half-yearly payments, the first payment to be made at the expiration of six calendar months from the solemnization of the said marriage. And it is hereby agreed that the trustees or trustee shall pay the said annual sum of 300*l.* to the person or persons and in the manner to whom and

SARGANT J. in which the annual income of the trust fund shall be payable
 1915 or applicable or would be payable or applicable in case the same
 ARBUTHNOT, had been received. Provided always that it shall not be obliga-
In re. tory upon the trustees or trustee to enforce the foregoing
 ARBUTHNOT covenant unless when required so to do in any specific case by
v. writing, signed by some person beneficially interested, and unless
 ARBUTHNOT. also due provision be made to the satisfaction of the trustees or
 trustee for payment of the costs of any proceedings required to
 be taken, and any omission or neglect by the trustees or trustee
 in any of the matters aforesaid (except when required and upon
 due provision made as aforesaid) shall not constitute a breach
 of trust. And the said William Reiersen Arbuthnot hereby
 declares and directs that the sums payable under the foregoing
 covenant shall not be taken in or towards satisfaction of any
 share which the husband may take in the residuary estate of
 him the said William Reiersen Arbuthnot under his will, and
 that the said annual sum shall at all times be paid free and
 exempt from Government duties, except income tax."

The settlement also contained (in clause 11 thereof) the following provision: "The said William Reiersen Arbuthnot hereby further covenants with the trustees hereinbefore named and with each of them, and as a separate covenant with the husband, that, if the said intended marriage shall be solemnized within six calendar months from the date hereof, and the husband and the wife or either of them or any of the issue of the husband by the now intended marriage shall be living at the death of the said William Reiersen Arbuthnot, he, the said William Reiersen Arbuthnot, will by his will give to the husband (but without prejudice to any provisions which he, the said William Reiersen Arbuthnot may make for his widow during the remainder of his life) not less than one equal thirteenth part of his residuary estate as hereinafter defined. And it is hereby agreed that, for the purpose of this provision, the expression 'residuary estate' shall include the residue of the real and personal estate of or to which the said William Reiersen Arbuthnot shall be actually seised, possessed, or entitled at his death (including real or personal estate over which he shall by his will have exercised any general power of appointment or

disposition), or the proceeds of conversion thereof which shall remain after payment of his funeral and testamentary expenses, debts, and specific or general devises or legacies given or appointed to or in trust for any persons other than his children, their respective husbands, wives or issue, or any of them, and shall also include the value of any property which the said William Reiersen Arbuthnot has already given or agreed to give or shall hereafter give or agree to give to any child of his (including the husband), or to the husband, wife or any of the issue of such child, or to any trustees to be held on trusts under which such child, or the husband or wife or any issue of such child shall take the first life interest (other than property of less value than 300*l.* and without taking into reckoning the aforesaid annual sum of 300*l.* covenanted to be paid in terms of this settlement given as aforesaid in any one year and other than moveable chattels or effects of household, domestic or personal use or ornament).”

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ARBUTHNOT,
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ARBUTHNOT
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The testator made another codicil to his will dated August 29, 1912, whereby he made certain immaterial alterations and in all other respects confirmed his will as altered by the former codicil.

The testator's wife predeceased him, and he died on May 31, 1913, having had fourteen children, one of whom died in infancy, and another of whom died in testator's lifetime leaving two children.

An originating summons was taken out by one of the trustees and executors of the testator against the other trustees and executors, and the children and grandchildren of the testator, asking (1.) for an inquiry what sums of money or property the testator at the date of his will had given or covenanted or agreed to give, or after the date of the will gave or covenanted or agreed to give to or with his children as named in the summons on his or her marriage or otherwise for his or her advancement or establishment in life; and (2.) whether, in the making of the said inquiry, the sum of 300*l.* per annum paid to the defendant Kenneth W. Arbuthnot during the joint lives of the testator and his widow in pursuance of the testator's covenant in the settlement was to be accounted for by that defendant notwithstanding the directions to the contrary contained in the settlement.

SARGANT J. *R. H. Hodge*, for the plaintiff, stated the facts and the questions involved.

1915
ARBUTHNOT, *Romer, K.C.*, and *Cecil W. Turner*, for the defendant Kenneth
In re. W. Arbuthnot. The hotchpot clause in the will is to be
ARBUTHNOT found in well-recognized books of conveyancing precedents, and
ARBUTHNOT has been taken, word for word, from Form 27 in Key and
— Elphinstone's Precedents in Conveyancing, 10th ed. vol. ii. p. 892 ;
9th ed. vol. ii. p. 835. It has never been contended hitherto that
the words "in default of any direction to the contrary in writing
under my hand" are in conflict with the provisions of the Wills
Act, 1837, and the Court will hesitate so to decide after the
precedent has been commonly used by conveyancers for many
years. The words "for his or her advancement" govern the
words "or otherwise," and in order that the provision for hotch-
pot may apply there must be present both a covenant to give on
marriage or otherwise and also an advancement. The annual
sum of 300*l.* is not an advancement but an allowance, and to
make matters plainer the testator has in the settlement said that
the amounts paid under the covenant are not to be taken in
satisfaction of Kenneth's share of residue. The sums of 300*l.* are
not in the nature of capital, to which only the hotchpot clause
applies. That clause only applies to sums which answer a
particular description, namely, sums advanced free from certain
conditions, and not to sums as regards which the testator, at the
time when the sum is covenanted to be paid, directs that they are
not to be in satisfaction of the beneficiary's share of residue.
Moreover, having regard to the date of the later codicil, both will
and codicils were really made after the time when the payments
of the 300*l.* per annum were made. That sum is, therefore, not
within the hotchpot clause.

W. R. Sheldon, for parties in the same interest, adopted the
preceding argument.

A. M. Begg, for other defendants. The 300*l.* a year was
covenanted to be paid on the marriage of Kenneth W. Arbuthnot,
and was clearly for his advancement in life. It is therefore
within the hotchpot clause. That clause means that all advances
are to be brought into hotchpot unless there a signed direction to
the contrary. That must mean a testamentary direction, for any

other direction would be contrary to the Wills Act, 1837. This SARGANT J. part of the clause is not a mere description of the class of sums to be brought into hotchpot. To read the clause as meaning "Provided always that all sums of money given or agreed to be given to any child on marriage or otherwise for his advancement in life in respect of which there shall not be a declaration to the contrary shall be brought into hotchpot" would be overstraining the words used. The argument in favour of the allowance not being within the hotchpot clause can only succeed if the words are read as descriptive of the class of sums to be brought in. Any other reading involves there being an abortive attempt to regulate testamentary dispositions by non-testamentary instruments. The declaration in the settlement as to the advance not being taken in satisfaction of Kenneth's share of residue cannot be looked at by the Court: *Smith v. Conder* (1); *Singleton v. Tomlinson* (2); *University College of North Wales v. Taylor*. (3) *Romer, K.C.*, in reply.

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SARGANT J. I direct the inquiry to be made in the terms of the summons, but, all parties agreeing, with the addition, at the end of the direction, of the words "and under what circumstances."

A question has arisen whether certain specific sums of 300*l.* a year, paid to the testator's son Kenneth since the year 1911, pursuant to the testator's covenant in Kenneth's marriage settlement, ought to be brought into hotchpot and accounted for under the directions in the testator's will.

The testator had thirteen children and by his will and codicils his residue was given to eleven of them. The codicils confirm the will and bring it down to date. [His Lordship read the material parts of the will and settlement, and continued:] The settlement was made after the first codicil but before the second one. When the testator covenanted to pay the sums in question he attached a condition to them, and there was a contemporary declaration that they were not to be brought into account.

There are three grounds on which it has been contended that

(1) (1878) 9 Ch. D. 170.

(2) (1878) 3 App. Cas. 404.

(3) [1908] P. 140.

SARGANT J. these sums should not be brought into account, and I think
1915 some if not all of these grounds are right. The first is that the
ARBUTHNOT, sums are not moneys to which the general language of the
In re. hotchpot clause applies; that they are not moneys in the nature
ARBUTHNOT of capital, or permanent sums in the nature of advancement or
v. establishment in life such as the clause contemplates. I incline
ARBUTHNOT. to take this view, but as the point is not absolutely clear, I will
deal with the other points.

The second ground is that the sums are not within the hotchpot clause because the testator only directs to be brought into hotchpot sums which answer a particular description, that is to say, sums advanced free from a declaration to the contrary. The clause is well known and appears in recognized precedent books, and I should be slow to hold it bad if there is a permissible construction which makes it good. Now in my judgment not only is the construction which reads the words as descriptive a permissible construction but it is the only true construction. And accordingly on this ground also the sums in question are outside the category of advances to which the clause applies.

The third ground is that, in view of the date of the second codicil, the will and codicils as a whole were really made after the time when the advances were made and specifically exclude them. This again mainly turns on the question whether the words are words of description. Coming to the conclusion that they are, I think that the fact that the second codicil was made after the settlement renders it still clearer that these sums are excluded from liability to be brought into hotchpot.

I accordingly make a declaration that these sums are not to be brought into account in the distribution of the residuary estate.

Solicitors for plaintiff: *Francis & Johnson.*

Solicitors for defendants: *E. F. Turner & Sons; C. Maconchy; Stibbard, Gibson & Co.*

F. E.

In re STEVENS.

SARGANT J.

STEVENS v. STEVENS.

1915

Feb. 2, 9.

[1914 S. 3388.]

Will—Real Estate—Tenant for Life—Trust of “as well the income as the corpus” in Remainder to Children who attain Twenty-one or Marry—Death of Tenant for Life leaving Infants—Destination of Rent till and after a Child attained Twenty-one.

Testator, who died in 1904, specifically devised real estate to trustees upon trust to permit his daughter to receive the income thereof during her life, and from and after her decease then “as well the income as the corpus” upon trust as she should by will appoint, and, in default of such appointment and so far as the same should not be disposed of by her will, in trust for all her children who being sons should attain the age of twenty-one years or being daughters should attain that age or marry in equal shares; and as to the residue of his real and personal estate gave the same upon trust for his widow during her life and after her death upon certain trusts in favour of his children.

The daughter died intestate in December, 1913, leaving six children, the eldest of whom attained twenty-one in December, 1914. Her other children were all infants and unmarried:—

Held, that the words “as well the income as the corpus” expressed an intention on the part of the testator to dispose of the income together with the corpus as from the day of the death of the tenant for life, and that each of the six children would be entitled to an equal share of the rents from that date if and on becoming entitled to a corresponding share of the corpus.

In re Averill [1898] 1 Ch. 523 distinguished.

Per Sargant J.: If the intermediate rents accruing before the eldest child attained a vested interest had fallen into the residue they would have been payable to the tenant for life of the residue as income.

ADJOURNED SUMMONS.

Edward Stevens, by his will, dated January 19, 1904, appointed his wife and two other persons his executors and trustees to whom he devised and bequeathed all his real and personal estate upon trust: (clause 2) As to certain hereditaments therein mentioned, to permit his daughter, Amelia Julia Dobbie, to receive the annual income thereof for her life, or until she should attempt to sell, mortgage, charge, or otherwise alien such income, or do any act whereby the same, if belonging to her absolutely, or some part thereof, and become payable to or vested in any other person (which of the said events should first

SARGANT J. happen); and if the trusts thereinbefore declared should determine
1915 in the lifetime of the said Amelia Julia Dobbie, in trust during
STEVENS, the remainder of her life to pay and apply the income thereof
In re. for the maintenance and support, or otherwise for the benefit of
STEVENS all or such one or more exclusively of the other or others of the
v. husband and issue for the time being of the said Amelia Julia
STEVENS. Dobbie in such manner and in all respects as his said trustees
should in their discretion think fit; and from and after the
decease of the said Amelia Julia Dobbie, then "as well the
income as the corpus of the same" upon trust as the said
Amelia Julia Dobbie should by will appoint, and in default of
such appointment and in so far as the same should not be
disposed of by her said will, then in trust for all her children
who being sons should attain the age of twenty-one years or
being daughters should attain that age or marry, in equal
shares, and if there should be but one child the whole to be in
trust for that one child; provided always that the said trustees
might from such attempted sale, mortgage, charge or alienation as
aforesaid, and during the life of his said daughter in their absolute
discretion pay to her a weekly sum not to exceed twenty shillings:
also (clause 5) As to and concerning his freehold houses and
cottages situate and being Beulah and Jarenth Villas, Nos. 14, 16,
18, 20 and 22, Kemble Road, and Nos. 63 and 65, Dennett Road,
all in Croydon, for the benefit of his daughter Beatrice Sarah
Farrow (the wife of Thomas Farrow) "upon the like and similar
trusts, conditions, provisions, limitations, power of appointment
and discretions as are hereinbefore declared concerning the prop-
erty above given to my said daughter Amelia Julia Dobbie";
and (clause 9) As to the residue of his real and personal estate
upon trust to permit his wife to receive the income thereof for
her life or until she should marry again, and from and after her
decease or remarriage upon trust to sell, call in and convert the
same into money, and to hold the same upon trust for each and
every the testator's children except his son William.

The testator died on March 23, 1904, leaving him surviving his widow and several children. The testator's daughter, Beatrice Sarah Farrow, the tenant for life of the property comprised in clause 5 of the will, did not forfeit her life interest and died on

December 25, 1913, intestate and leaving her surviving her husband, Thomas Farrow (who was her administrator), and six children, the eldest of whom, Madeline Beatrice Farrow, attained twenty-one on December 14, 1914. The five other children were still infants and unmarried.

This was an originating summons taken out by the trustees, other than the testator's widow, for the determination of the following questions: (1.) To whom the rents, profits and income of the properties comprised in clause 5 of the will between December 25, 1913, the date of the death of the tenant for life, and December 14, 1914, the date when Madeline Beatrice Farrow attained twenty-one, belonged or were payable; (2.) if they fell into residue then whether they were payable to the testator's widow as tenant for life of the residue or whether they ought to be capitalized; and (3.) whether the rents, profits, and income after December 14, 1914, were payable wholly to Madeline Beatrice Farrow until another child attained a vested interest or belonged to her and the five infant children equally.

T. K. Crossfield, for the summons, stated the questions, and referred to *In re Averill* (1); Theobald on Wills, 7th ed. p. 312.

E. J. L. Whitaker, for the testator's widow. As regards the first question raised by the summons, the rents between the dates of the death of the tenant for life and of the eldest child attaining a vested interest fall into the residue: *Countess of Bective v. Hodgson* (2); *In re Eddel's Trusts* (3); *In re Averill* (1), where the unreported decision of Chitty J. upon this point is stated in the body of the report. The words "as well the income as the corpus" do not take the case out of the general rule. When the contingency happens the rents go to the child attaining a vested interest, and the words mean no more than that.

J. F. Carr, for Madeline Beatrice Farrow. As regards the first question raised by the summons, I contend that there is an express disposition of the rents between the dates of the death of the tenant for life and the date when Madeline Beatrice Farrow

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(1) [1898] 1 Ch. 523.

per Lord Westbury L.C.

(2) (1864) 10 H. L. C. 656, 664,

(3) (1871) L. R. 11 Eq. 559.

SARGANT J. attained a vested interest. In the cases cited against this contention there was no indication of any intention to dispose of the intermediate rents, whereas in the present case the words "as well the income as the corpus" clearly show such an intention. It cannot be disputed that the tenant for life might by her will have appointed the entire income from the date of her own death, and the natural inference is that the testator meant the donees in default of appointment to take all that was subject to the power. *Best v. Donmall* (1) is in my favour. In *In re Eddel's Trusts* (2) Bacon V.-C. decided the case in the other way because of the absence of any indication of an intention to dispose of the income. [He also referred to *Riley v. Garnett* (3); *Bullock v. Stones* (4); *Holmes v. Prescott*. (5)] As to the third question raised by the summons, *In re Averill* (6) lays down the rule that the whole of the rents for the time being goes to the child who has attained a vested interest, but on the footing of my argument on the first point I feel a difficulty in contending that the present case falls within the rule.

W. H. Salter, for the infant children. As to the first question raised by the summons, I support the same argument.

As to the third question raised by the summons, I submit that, if the will excludes the rule stated in *Countess of Bective v. Hodgson* (7), it equally excludes the rule in *In re Averill* (6), since the words "as well the income as the corpus" run through the whole trust. The whole of the rents therefore as from the date of the death of the tenant for life will belong to all the children in the proportions in which they become entitled to the capital.

E. J. L. Whitaker in reply on the cases cited. *Best v. Donmall* (1) is an anomalous case and contrary to the general current of authority: Theobald on Wills, 7th ed. p. 180; Jarman on Wills, 6th ed. p. 942, n. *Riley v. Garnett* (3) was virtually overruled by *Holmes v. Prescott*. (5) The decision in *Bullock v. Stones* (4) is really in my favour.

(1) (1871) 40 L. J. (Ch.) 160.

(2) L. R. 11 Eq. 559.

(3) (1849) 3 De G. & Sm. 629.

(4) (1754) 2 Ves. Sen. 521.

(5) (1864) 33 L. J. (Ch.) 264; 12 W. R. 636.

(6) [1898] 1 Ch. 523.

(7) 10 H. L. C. 656, 664.

The second question raised by the summons was argued SARGANT J. separately.

E. J. L. Whitaker, for the testator's widow. If the intermediate rents fall into the residue they are payable to the testator's widow as tenant for life of the residue. They represent income, not capital.

W. H. Salter, for Thomas Farrer, the administrator of Beatrice Sarah Farrow, argued the question for the persons entitled in remainder. If the intermediate rents fall into the residue they ought to be capitalized: *In re Pope*. (1)

SARGANT J. I am prepared to deal at once with this question, if it should arise, and to hold that, if the intermediate rents fall into the residue, they ought to be paid to the testator's widow as income. On the other questions raised by the summons I propose to reserve my judgment.

Feb. 9. SARGANT J. delivered a written judgment in which he read clauses 2, 5, and 9 of the testator's will and after stating the facts above set out continued:—

Two questions now arise, namely: (1.) Who is entitled to the rents, profits and income of the hereditaments devised by clause 5 of the will from December 25, 1913, the day of the death of the tenant for life, to December 14, 1914; and (2.) who are and will be entitled to these rents, profits and income until all the shares of the children are vested.

If the trust after the death of the tenant for life had been merely of the hereditaments themselves or of the capital or corpus of them, then I think it is clear that the income for the first period in question would have been undisposed of under the trust and so have fallen into residue; for in the case of realty a gift in futuro whether specific or residuary does not in general include the intermediate income of the property, unless indeed the gift of realty is coupled with a gift of personalty carrying intermediate income: see *Countess of Bective v. Hodgson* (2); and it is equally clear that on the like hypothesis the income for

1915
 STEVENS,
In re.
 STEVENS
v.
 STEVENS.

(1) [1901] 1 Ch. 64.

(2) 10 H. L. C. 656.

SARGANT J. the second period in question would from time to time belong to the child or children who had attained a vested interest in the corpus and if more than one in equal shares. Both points are on the suggested hypothesis completely covered by the successive decisions of Chitty J. and Romer J. in *In re Averill*. (1)

1915
 STEVENS,
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 STEVENS
 v.
 STEVENS.

Is then the result altered by the fact that the gift after the death of the tenant for life is not merely of the hereditaments themselves but of "as well the income as the corpus" of the hereditaments? In my judgment it is. The strict real estate rule on the subject is easily relaxed or modified as is shown by such cases as *Countess of Bective v. Hodgson* (2); and here by the express mention of income not only in addition to corpus but before the mention of corpus I think that the testator expresses an intention to deal with and dispose of the income of the property as from the day of the death of the tenant for life. It is quite clear for example that under these trusts the tenant for life might have appointed the income as from the date of her death, and it is almost if not quite equally clear that whatever she might have appointed, income as well as capital, is expressly given to her children in default of appointment.

This disposes of any claim on the part of the residuary devisee to the intermediate income down to December 14, 1914. I have still to consider the distribution of that income and of the subsequent income down to the final vesting of all the shares in the property as between the six children of the tenant for life. Here again I think all the difference is made by the express and prior mention of "income." It was pointed out by Chitty J. in *In re Holford* (3) when considering the effect of a gift of residuary personalty to a contingent class such as this that the cardinal principle laid down by Lord Westbury in *Countess of Bective v. Hodgson* (2) was that in such cases the income was impliedly given with and followed the capital as an accessory to it. Here in my judgment there is something stronger than implication, namely, an express gift of income together with and as accessory to corpus, and not merely of income as from the time of the vesting

(1) [1898] 1 Ch. 523.

(2) 10 H. L. C. 656.

(3) [1894] 3 Ch. 30, 35.

of the corpus (for that would take place any how and apart from the express mention of income) but of income throughout and continuously from the death of the tenant for life. And the result therefore is that the defendant Madeline Beatrice Farrow is not entitled to the income of the whole of the property for any period but that each of the six children is and will be entitled to one sixth of the income of the property if and when becoming entitled to a corresponding sixth of the corpus thereof, and will in the meantime be entitled to maintenance out of such income if such maintenance is otherwise justified.

SARGANT J.
1915
STEVENS,
In re.
STEVENS
v.
STEVENS.

Solicitors: *F. W. Morris ; G. M. Folkard.*

A. C.

In re JOHNSON.
COWLEY *v.* PUBLIC TRUSTEE.

[1914 J. 1480.]

ASTBURY J
1915
Jan. 20, 21.

Settled Land—Trust either to retain or sell—Subsequent Power of Postponement—Trust or Power—Construction—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 63.

A testator devised and bequeathed his real and personal estate to trustees upon trust "either" to retain it in the same state as at his death "or" at such times as the trustees thought fit to sell and convert it into money and to invest the proceeds in certain securities and to hold the trust estate in trust to pay the income to the plaintiff for life and subject thereto in trust for other beneficiaries.

The will contained a common form power of postponement, and the trusts were such as are ordinarily applicable to personal estate:—

Held, that the will created an immediate trust for sale with a mere power of postponement, which was a trust for sale within s. 63 of the Settled Land Act, 1882.

In re Crips (1906) 95 L. T. 865 and *In re Wagstaff's Settled Estates* [1909] 2 Ch. 201 followed.

In re Hotchkys (1886) 32 Ch. D. 408; *In re Horne's Settled Estate* (1888) 39 Ch. D. 84; and *In re Goodall's Settlement* [1909] 1 Ch. 440 distinguished.

ORIGINATING SUMMONS.

By his will, dated January 23, 1906, a testator (by clause 8) devised and bequeathed his residuary real and personal property

ASTBURY J. (except copyhold property) unto and to the use of his trustees
1915 "upon trust either to retain the whole or any part thereof in the
JOHNSON, same state as at the time of my death or at such time or times
In re. and in such manner as my trustees shall think fit to sell call-in
COWLEY and convert into money all or any part thereof " and after pay-
v. ment of his debts, funeral and testamentary expenses, legacies, and
PUBLIC duties "upon trust to invest the proceeds (which with any part
TRUSTEE. of my residuary real and personal property for the time being
remaining uninvested and all investments for the time being
representing the same or any part thereof are all hereinafter
referred to as my trust estate) in some or one of the investments
hereinafter authorised."

And upon trust (clause 9) "out of the dividends income and annual produce of my trust estate " to pay certain annuities and subject thereto (clause 10) upon trust in the events that happened to pay the income to the plaintiff for life.

Subject as aforesaid (clause 11) the trustees were to pay or apply the income of the trust estate to or for the benefit of the defendants Edith Johnson and her children at the trustees' discretion and from and after the decease of Edith Johnson they were to hold the trust estate and the income thereof in trust for her children by her husband, Edward Johnson, who being sons should attain the age of twenty-one years or being daughters should attain that age or marry in equal shares as tenants in common.

By clause 12 the testator declared "that my trustees may in their uncontrollable discretion and without being responsible for any loss or diminution of value which may result therefrom postpone the sale and conversion of any part of my residuary real and personal property and particularly any of my real property which in the opinion of my trustees has any present or prospective value as building land, and the income of any property until sale or conversion shall be held and applied upon the same trusts as are declared concerning the income of my trust estate."

By clause 13 the testator empowered the trustees to let "any hereditaments for the time being remaining unsold" and "generally manage the said hereditaments in such manner as my trustees shall think fit."

By clause 14 the testator directed that "my copyhold estates (if any) shall be sold and applied by my trustees or otherwise dealt with and the income and moneys arising thereby held and applied as directed with respect to my other residuary real estate and the produce and income thereof," and in case it should be necessary that his trustees should be admitted thereto then he devised the same unto such one or more of his trustees as his trustees should deem fit for the purposes of his will.

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By clause 15 the testator, after specifying the stocks, funds, shares, and securities, including mortgage securities, in which the trustees might invest, empowered them "on any sale of any part of my real property to lend any part of the purchase money up to three fourths thereof to the purchaser upon mortgage of the property so sold."

The testator died on October 2, 1909, and his will was duly proved.

On October 24, 1913, the Public Trustee was appointed trustee of the will in the place of the surviving trustees.

The defendant Edith Johnson had two children only, namely, the defendant Winifred Johnson and the defendant Sybil Nicolls, a married woman, both of whom were of age.

The share of Sybil Nicolls was caught by the after-acquired property clause of her marriage settlement of January 21, 1909.

In these circumstances the plaintiff claimed to be equitable life tenant of the residuary real estate, and desired to be let into possession on the usual undertakings. She intended to exercise her powers under the Settled Land Acts.

The remaindermen contended that the residuary real estate was held on trust for sale within s. 63 of the Settled Land Act, 1882, so that the plaintiff could only exercise her powers with the leave of the Court under s. 7 of the Settled Land Act, 1884 (47 & 48 Vict. c. 18).

On October 6, 1914, the plaintiff issued this summons to determine (inter alia) whether on the construction of the will the residuary real estate was subject to a trust for sale. If so she asked leave to exercise her powers under s. 63. In any case she asked for possession on the usual undertakings.

ASTBURY J. *Hon. Frank Russell, K.C., and Alfred Adams, for the plaintiff.*

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The only trust for sale is that of the copyholds in clause 14. The other residuary real estate is devised to the trustees under clause 8 upon trust either to retain or sell as they think fit. That alternative trust merely gives the trustees a discretionary power of sale as in *In re Hotchkys*. (1) The power of postponement in clause 12, which was probably inserted *ex abundanti cautela*, cannot turn this discretionary power into an imperative trust.

It is possible that the trustees might determine that the property ought to be sold. In that case the alternative trust might become a trust for sale. But that is not an immediate trust for sale with a mere power of postponement. It is a trust for sale that may never arise and is therefore not within s. 63: *In re Horne's Settled Estate* (2); *In re Goodall's Settlement*. (3)

Hewitt, K.C., and Sheldon, for the defendant Edith Johnson and her daughter Winifred Johnson. It is clear on the construction of the whole will that the testator intended to convert his property into personalty, and therefore clause 8, which happens to be a common form in a personalty settlement, should be construed as an imperative trust for sale: 1 White and Tudor's Leading Cases, 8th ed. p. 365; *Grievesson v. Kersopp* (4); *In re Hotchkys* (1); *In re Wagstaff's Settled Estates* (5); *In re Crips*. (6) The last case is very like the present. The power of postponement is otiose unless there is a trust for sale.

The mere power of postponement does not of course take the case out of s. 63. There is no direction to postpone the sale for a definite period as in *In re Horne's Settled Estate* (2), nor can the trust be put an end to as in *In re Goodall's Settlement*. (3) It is the case of an immediate trust for sale with a mere power of postponement and is directly within s. 63.

Micklem, K.C., and Eastwood, for Sybil Nicolls and the trustees of her marriage settlement, adopted the same argument and pointed out that in modern conveyancing the power of postponement was frequently contained in the trust for sale.

(1) 32 Ch. D. 408, 415.

(2) 39 Ch. D. 84.

(3) [1909] 1 Ch. 440.

(4) (1838) 2 Keen, 653.

(5) [1909] 2 Ch. 201.

(6) 95 L. T. 865.

See for instance Key and Elphinstone's Precedents, 10th ed. ASTBURY J. vol. ii. p. 872.

E. Ff. Ball, for the Public Trustee.

Hon. Frank Russell, K.C., in reply. If the testator intended to create a trust for sale with a mere power of postponement, *cadit quaestio*. But clause 8 is a curious mode of expressing such an intention. On the face of it it gives the trustees an absolute alternative option either to retain the property or to sell it. *In re Crips* (1) is really inconsistent with *In re Hotchkys* (2) and is of doubtful authority.

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ASTBURY J. The first question on this summons is whether the clauses of this particular will, which is unusual in form, do or do not contain a trust for sale of the testator's residuary realty within the meaning of s. 63 of the Settled Land Act, 1882. [His Lordship stated the facts and continued:] The question primarily arises upon clauses 8 and 12 of the will. If clause 8 had stood alone I think there would have been considerable difficulty in the matter, and in fact the question is far from clear in my judgment on the will as it stands.

A number of authorities have been referred to which I only propose to mention very shortly.

In *In re Hotchkys* (2) the testatrix gave her real and personal estate to trustees upon trust at their discretion to sell the same and after making certain payments thereout to invest the residue in certain securities and to stand possessed of such real and personal estate and securities upon trust to pay the rents and dividends to one Emily Tuson for life, and from and after her decease the testatrix gave, devised, and bequeathed her said real and personal estate and the securities on which the same might be invested unto and to the use of Vincent Calmady, his heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively. Cotton L.J. said: "Now with reference to the question whether there is a trust for sale so as to create an absolute conversion, in my opinion the Vice-Chancellor is right in the opinion he has expressed that there is not. After the gift to the trustees the testatrix goes on

(1) 95 L. T. 865.

(2) 32 Ch. D. 408, 415.

ASTBURY J. to say 'Upon trust at their discretion to sell and dispose of all
 1915 such parts thereof as shall not consist of money, and out of the
 JOHNSON, produce of such sale shall first pay all my just debts and my
In re. funeral and testamentary expenses, and shall then invest the
 COWLEY residue of such moneys in'"—certain investments—"and shall
v. stand possessed of such real and personal estate, money, and
 PUBLIC securities,'" and then he reads the will as I have read it, and
 TRUSTEE. continues: "In my opinion, although, as I have said before, the
 — direction as to the sale is in form a trust, it is not a trust for
 conversion of the whole of the estate immediately on the death
 of the testatrix, when the will comes into operation, but a
 power in the form of a trust giving them a discretion whether to
 sell or not—a power to sell such part of the real estates as they
 shall in their discretion think it desirable to sell. Undoubtedly
 they may if they think it desirable, either for the purpose of
 payment of the debts or otherwise, sell the whole, but there is
 not a direction to them to sell the whole. In my opinion that is
 shewn not only by the terms of the ultimate trust for the
 remainderman, but also by the direction 'that the rents, interest,
 and dividends and annual produce thereof' are to be paid to the
 tenant for life"; and Lindley L.J. gives judgment to the same
 effect.

Now there is no question that an ordinary power to postpone
 at discretion does not prevent an ordinary trust for sale being
 a trust or direction for sale within the meaning of s. 63. But
 in this case the plaintiff, who at the present time is entitled to
 the income of the residuary estate, contends that there is an
 option given to the trustees either to retain indefinitely, or to
 sell, and that therefore there is no trust for sale at all, and in any
 case no trust for sale within s. 63.

In this connection *In re Horne's Settled Estate* (1) has been
 referred to, in which the will contained a trust for sale with a
 direction that the property was not to be sold until the
 expiration of twenty-one years from the date of the will. The
 Court held that this was not a trust for sale within s. 63.

In *In re Goodall's Settlement* (2) Swinfen Eady J. decided that
 a trust for sale that may never arise is not a "trust or direction

(1) 39 Ch. D. 84.

(2) [1909] 1 Ch. 440.

or sale" within the section. In that case the husband was entitled to the life income under a conveyance and a contemporaneous settlement where the trusts were that the trustees should at the request in writing of the husband during his life and after his death at their discretion sell, with a further provision that if the husband should by any deed or will make any declaration or direction that the lands comprised in the conveyance should not be sold under the trust in that behalf contained in that conveyance the same trust for sale should not be exercised. In that case the learned judge held that this being a trust for sale which might never arise was not a trust or direction to sell within the meaning of the Act.

In *In re Wagstaff's Settled Estates* (1) Neville J. held that "The fact that a trust for sale cannot be exercised without the consent of the tenant for life does not prevent its being a trust or direction for sale within the meaning of s. 63 of the Settled Land Act, 1882."

In *In re Crips* (2), a case far nearer to the present than any other cited, a testator gave the residue of his real and personal estate to trustees upon trust either to allow the same to remain in its state of investment at his decease, or, as and when the trustees in their absolute discretion thought fit, from time to time to realize and sell and convert the same into money, and to reinvest the money when and as realized in trust securities and to stand possessed of the investments upon trust to pay the income as therein mentioned. Kekewich J. distinguished the trust before him from that in *In re Horne's Settled Estate* (3), where the sale was directed to be postponed for a definite period, and held that notwithstanding the alternative form of the trust, namely, either to allow the property to remain in its then state of investment or to sell the same, it was having regard to the will as a whole a trust for sale within the meaning of the Act.

In the present case, first of all there are no subsequent gifts or expressions following upon the directions to retain or sell which, as in *In re Hotchkys* (4), show any intention on the part of the

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(3) 39 Ch. D. 84.

(2) 95 L. T. 865.

(4) 32 Ch. D. 408.

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1915 such. What he does say is, "Upon trust to invest the proceeds
JOHNSON, (which with any part of my residuary real and personal property
In re. for the time being remaining uninvested are all herein-
COWLEY after referred to as my trust estate)." "Remaining uninvested"
v. must I think mean "remaining unsold and uninvested," and the
PUBLIC subsequent trusts of the will are all trusts which are ordinarily
TRUSTEE. applicable to personal estate.

The true solution of this difficulty is clause 12. The power to retain in clause 8 read by itself may have been intended by the testator as an indefinite power to retain absolutely, or he may have meant by the expression a mere power to postpone. But in clause 12 he gives his trustees an ordinary and general power to postpone the sale and conversion of any part of his real estate. He does not limit that to any such portion of his real estate as the trustees shall have elected to sell under the terms of clause 8, but it is in general terms. He directs his copyholds to be sold absolutely, they not being within the terms of clause 8, and having regard to the will generally, and to the general and ordinary terms of the power to postpone in clause 12, I think the true view is, although the matter is not free from difficulty, that clause 8 ought to be read as amounting to an immediate trust or direction to sell subject to a power to retain, which power to retain must I think be construed as referring to the power to postpone, which is expressly given in the later clause in ordinary terms.

Therefore on the whole I think that there is a trust or direction to sell in this will within the meaning of s. 63.

Solicitors: *Clowes, Hickley & Steward; Thompsons, Quarrell & Jones; Charles Rogers, Sons & Abbott; Tilleards.*

G. R. A.

In re MOUNTGARRET AND MOORE'S CONTRACT.

ASTBURY J.

[1914 M. 2650.]

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Jan. 27.

Settled Land—Life Estate—Assignment for Value—Settlement by Assignee's Will—Death of Assignee—Sale by Original Life Tenant—Persons qualified to consent—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 50.

The assignee for value of a life tenant's estate died, having devised that estate *pur autre vie* to trustees during the life of P., aged eleven, with legal remainders over in strict settlement.

The original life tenant or *cestui que vie* was aged forty, so that the legal remainders in the estate *pur autre vie* were very unlikely to come into possession.

The trustees who were in possession of the settled estates under this devise had full powers of management till P. attained twenty-five and for his whole life if he previously incumbered, but otherwise on attaining twenty-five he took a life interest with possession till he incumbered.

The original life tenant contracted to sell part of the settled estates under the powers preserved to him by s. 50 of the Settled Land Act, 1882 :—

Held, that in the special circumstances the consent of the trustees was a sufficient consent within the section on behalf of the estate of the assignee for value.

VENDOR AND PURCHASER SUMMONS.

By a contract dated June 24, 1914, the vendor, as life tenant under the Settled Land Acts, agreed to sell Blackacre to the purchasers for 68,000*l*.

The vendor's title was as follows.

By a resettlement dated October 5, 1896, and made between the vendor's father of the first part, the vendor of the second part, and trustees of the third part, the B. estates, including Blackacre, were resettled in effect to the use of the vendor's father for life with remainder to the use of the vendor for life with remainders over.

On May 18, 1903, the vendor was adjudicated bankrupt, and in January, 1904, the vendor's father agreed to purchase the vendor's reversionary life estate in the B. estates from the trustee in bankruptcy.

By a conveyance on sale dated January 21, 1904, and made between the vendor's trustee in bankruptcy of the first part, the vendor of the second part, the vendor's father of the third part,

ASTBURY J. an incumbrancer on the vendor's reversionary life estate of the fourth part, and Wadham of the fifth part, the vendor's reversionary life estate in the B. estates was assigned to Wadham, his heirs, executors, administrators, and assigns, in trust for the vendor's father, his heirs, executors, administrators, and assigns, and it was provided that nothing therein contained should operate to merge the father's life estate.

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The incumbrance on the vendor's reversionary life estate was in fact already held in trust for the vendor's father, and it was kept alive in this conveyance.

By his will, dated February 22, 1911, the vendor's father devised his A. estate and all other his real estate to the use of the trustees of his will during the life of his second son Piers without impeachment of waste upon the trusts thereafter declared, with legal remainders over in the events that happened to Piers' sons successively according to seniority in tail male, with remainder to Piers' sons successively according to seniority in tail general, with remainder to Piers' daughters successively according to seniority in tail general, with other legal remainders over in strict settlement.

The testator declared that the estate limited to the trustees during the life of Piers was so limited to them upon the trusts following, namely, upon trust that if Piers should survive the testator and should at the time of the limitation taking effect in possession be under twenty-five the trustees should enter into possession or receipt of the rents and profits and should so long as Piers was under twenty-five continue in such possession or receipt of rents and profits and during such continuance in possession and receipt might exercise all the powers vested in trustees by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 42, during an infant's minority, and should so long as Piers was under twenty-five out of the rents and profits pay or apply such annual sums by way of allowance to or for his benefit as they should in their discretion think proper, and should during such period (but not for more than twenty-one years from the testator's death) accumulate the residue of the net rents and profits by investing the same and the resulting income in the investments thereafter authorized, and the accumulated fund should be held

upon the same trusts as if it were capital money arising under the Settled Land Acts from the settled hereditaments and so as to be primarily liable to be invested in the purchase of hereditaments in fee simple to be settled to the uses thereby declared concerning the settled hereditaments.

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And upon further trust that if and when Piers should attain twenty-five the trustees should, if at the time of his attaining twenty-five no act or event should have been done or suffered or have happened whereby the equitable life interest thereafter given to Piers in the settled hereditaments or any part thereof if belonging to him absolutely would have become vested in or charged in favour of some other person, the trustees should permit Piers to enter into and continue in the possession or the receipt of the rents and profits of the settled hereditaments during his life or until some act or event should be done or suffered or happen whereby such life estate or some part thereof would if belonging absolutely to him become vested in or charged in favour of some other person.

The testator further provided that the trustees should not be liable for allowing Piers to remain in possession after the failure or determination of the trust in his favour unless they received express notice of some such act or event as aforesaid, and that in the event of the failure or determination of Piers' life estate all the powers annexed thereto should thenceforth cease to be exercisable by him. It was also provided that the exemption from impeachment for waste conferred on the trustees in respect of the estate limited to them during Piers' life was conferred on them for their protection but should not authorize or entitle Piers to require the trustees to cut timber or commit waste for Piers' benefit in any case in which the trustees should not in their discretion think proper so to do.

The testator also declared that after the failure or determination in Piers' lifetime of the trust declared in his favour the trustees should continue in or enter into the possession or receipt of the rents and profits of the settled hereditaments and continue in such possession or receipt and manage the same during the rest of his life with the same powers as if they were in such possession or receipt during the minority of an infant tenant in tail,

ASTBURY J. and with liberty to exercise all such powers as were conferred on
 1915 life tenants by the Settled Land Acts and with the additional
 MOUNT- powers of management conferred by the will, and should during
 GARRET AND the remainder of Piers' life or during such shorter periods con-
 MOORE'S tinuous or discontinuous as the trustees should in their absolute
 CONTRACT, discretion think fit pay or apply all or any part of the net rents and
In re. profits unto or for the maintenance or personal support or benefit
 of Piers and the other persons therein mentioned in such manner
 as the trustees should in their absolute discretion think proper.

And the testator declared that the trustees should be trustees for the purposes of the Settled Land Acts of the settlement created by his will.

The testator also declared that the vendor's reversionary life interest in the B. estates, which life interest was purchased by the testator from the vendor and his trustee in bankruptcy, was intended to be included in the devise of his real estate and should during the subsistence thereof pass under the limitations thereinbefore declared of that real estate.

By a codicil dated February 22, 1912, the testator declared (inter alia) that the mortgage on the reversionary life interest, which mortgage was held in trust for him, should as from his death be deemed to be absolutely merged and extinguished.

The testator died on October 2, 1912, and the vendor's reversionary life estate in the B. estates, including Blackacre, fell into possession.

The vendor was forty years old and his brother Piers eleven years old. The legal estate in the B. estates during the vendor's life was still outstanding in Wadham.

The trustees (who with the testator's widow were his executors) were now in possession of the B. and A. estates and it was assumed that the devise had been assented to.

In these circumstances the question arose who were the persons whose consent was required by s. 50 of the Settled Land Act, 1882, to the exercise of the vendor's powers. (1)

(1) Sect. 50 provides as follows:—

Sub-s. 1: "The powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being,

by operation of law or otherwise, an assignee of a tenant for life, and remain exerciseable by the tenant for life after and notwithstanding any assignment, by operation of law

In answer to requisitions the vendor contended that the trustees were qualified to give a sufficient consent either in their capacity of devisees, or on the alternative grounds mentioned in the judgment. The purchasers issued this summons to determine the point. The case was decided on the first ground only, and the arguments on the alternative points are therefore omitted.

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Howard Wright, for the purchasers. The trustees are not assignees of the entirety of the vendor's life estate. They only take it during Piers' life. On his death it goes over in strict settlement. If Piers attains twenty-five without incumbering, the trustees' powers of management will cease, and Piers will become entitled to an equitable life interest subject to forfeiture on incumbering. He will then have the powers of a life tenant under s. 58, sub-s. 1, clause vi., and having full dominion will be able to consent. But how can the trustees with their present temporary dominion now consent so as to bind either Piers or the legal remaindermen, many of whom are yet unborn? This is unfortunately a *casus omissus* in the Act.

Ashworth James, for the vendor. The trustees are really assignees of the whole of the vendor's life estate subject to the improbable contingency of Piers predeceasing the vendor. They are in possession with full powers of management till Piers attains twenty-five and for the whole period if he previously incumbers. They are the only persons who can now consent, and unless their consent is sufficient the vendor's powers

or otherwise, of his estate or interest under the settlement."

Sub-s. 2 : "A contract by a tenant for life not to exercise any of his powers under this Act is void."

Sub-s. 3 : "But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights shall not be affected without his consent, except that, unless the assignee is actually in possession of the settled land or part thereof, his

consent shall not be requisite for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this Act."

Sub-s. 4 : " . . . In this section assignment includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance; and assignee has a meaning corresponding with that of assignment."

ASTBURY J. as life tenant are paralysed by the will, which having regard
1915 to s. 51 is impossible.

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Howard Wright in reply.

ASTBURY J. (after stating the facts). It is not disputed, and therefore I need not discuss it, that under s. 50, sub-s. 3, the assignee for value of the life tenant's interest is not to be prejudiced, without his consent, by the exercise of the assignor's powers preserved to him by sub-s. 1, and the only question I have to determine is whether there is any person now in existence who, having regard to the assignee's settlement by will of this life interest, is capable of consenting.

It is reasonably clear that sub-s. 3 cannot be confined to the actual assignee for value, who may of course die immediately after the assignment, but it must be intended to protect the assignee for value and beneficiaries claiming under him.

The vendor maintains that the trustees of the will are assignees within sub-s. 3 and are entitled to consent thereunder, either (1.) directly by reason of the devise to them or (2.) indirectly on one of the two following grounds: First, because Piers is a person having a life tenant's powers, under s. 58, sub-s. 1, clause vi., and being an infant the trustees can exercise those powers for him under s. 60, and, being thus clothed with a right to effect an out and out sale of this property, are able to consent within s. 50, sub-s. 3; or, secondly, because the trustees themselves are persons having those powers under s. 58, sub-s. 1, clauses v., vi.

On the point as to the devise to the trustees the purchasers say that the trustees of the will only hold this property during Piers' life, and that they have not therefore vested in them the whole beneficial interest of the assignee for value. The vendor on the other hand contends that the whole of the assignee's interest was devised to the trustees subject only to defeasance by the improbable contingency of Piers predeceasing the vendor, and that in the meantime they are clothed with full trust and management of the entire interest till Piers attains twenty-five and for the whole period if he previously incumbers.

There is apparently no authority upon the point, but I think

the matter depends largely upon the following considerations. ASTBURY J.
 In the first place it is quite plain that the testator was an assignee for value of the vendor's life estate. It is equally clear that he has devised the interest so assigned to him to the trustees of his will during Piers' life for the purposes of the trust settlement thereby made during Piers' life with legal remainders over in strict settlement on Piers' death.

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Sect. 51, though of no direct application here, shows the very strong intention of the Legislature to nullify any intentional or accidental attempt to interfere with a life tenant's powers. It cannot have been intended that the powers preserved by s. 50, sub-s. 1, should become unexercisable, in the event of the life tenant's estate being settled by his assignee for value, owing to the difficulty of finding or ascertaining the persons qualified to consent within sub-s. 3. It is possible, if neither the trustees nor Piers are qualified to consent, that there may be no assignee whose consent is required. But I do not think that view ought to be taken if there is any possibility of safeguarding the rights of those claiming under the assignee for value, by means of a consent, of some one representing him in substance and in fact.

On the whole, in my opinion, the trustees of the will are qualified to consent within sub-s. 3 on the ground that they are for the moment, and it may be during the whole existence of the vendor's life estate, entitled to the whole of the assignee's present interest in it for the purposes of the settlement created by the assignee's will, and during that period are invested with full and ample powers of management both under the Settled Land Acts and otherwise.

[His Lordship then made a few observations on the alternative points, but, owing to the difficulty of reconciling the authorities, he expressed no opinion thereon, preferring to rest his judgment on the first ground, and accordingly making a declaration that the consent of the trustees of the will was a sufficient consent within s. 50, sub-s. 3.]

Solicitors: *Blundell, Gordon & Co., for Wright & Wright, Keighley; Evans, Wadham & Co.*

G. R. A.

EVE J.

[LIVERPOOL DISTRICT REGISTRY.]

1914

Jan. 16.

In re WILLIAMS.
CUNLIFFE *v.* WILLIAMS.

[1913 W. 2401.]

Election—Will—Administration—Husband and Wife—Mortgage of Property belonging to Wife—Election of Wife to take under Will—Liability of Property brought in by Election for Debts—Incidence of Contribution as between Beneficiaries—Real Estate Charges Act, 1854 (17 & 18 Vict. c. 113), s. 1.

A testator, whose estate consisted chiefly of five leasehold properties, appointed his wife and C. executors and trustees and gave all his estate to them upon trust to pay to his wife the rents for life, and after her death he left his four leasehold messuages in Q. Street and his six leaseholds in J. Street to his trustees upon trust to pay the income to his daughter, E. S., for life, and after her death to her children; and after the death of his wife he bequeathed two leaseholds in R. Street and a leasehold villa, B., to a niece, and after disposing of the remaining leaseholds in S. Street for the benefit of E. S. and her children, he bequeathed the residue of his estate to his wife, charged with debts. The property in Q. Street was subject to a mortgage for 318*l.* The property in J. Street was assigned to the testator's wife in 1888, and by a deed of August 25, 1909, the testator purported to mortgage it to secure 400*l.* This mortgage was existing at his death. The leasehold villa B. was assigned to the testator and his wife jointly in 1905, and by a deed of August 15, 1905, they jointly mortgaged the same to secure 400*l.* The other leaseholds in R. and S. Streets were also assigned to the testator's wife in 1888. The widow elected to take under the testator's will.

On an originating summons by C. to have it determined how, as between the beneficiaries, the two mortgages for 400*l.* respectively and the debts should be borne:—

Held, that the equities had to be determined as at the testator's death, and as to the mortgage of 400*l.* on the J. Street property, created without the knowledge of the wife, Locke King's Act did not apply, and this property was not primarily liable for the payment of this mortgage debt. But *held* as to the villa B., mortgaged by a deed to which the wife was a party, that Locke King's Act applied, and the property was primarily liable for the charge upon it.

Held, further, that, the residue of the testator's estate being now insufficient for the payment of debts, the property brought in by

reason of the widow's election was liable to contribute *pari passu* with the testator's property in discharging his debts.

Cooper v. Cooper (1874) L. R. 7 H. L. 53, 69, applied.

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ADJOURNED SUMMONS.

By his will, dated June 6, 1913, William Reynolds Williams, of Birchfield, Abergavenny, after appointing his wife, the defendant Elizabeth Virginia Williams, and the plaintiff, Arthur Murgatroyd Cunliffe, to be his executors and trustees, and making certain bequests, gave, devised, and bequeathed all his real and leasehold estates unto his trustees upon trust to pay or permit his wife to receive the rents and profits thereof during her life, and after her death he gave and bequeathed his four leasehold messuages situate in Queen Street, Abergavenny, and the leasehold shed, and stables adjoining, and his six leasehold messuages and stables in James Street, Abertillery, to his trustees upon trust to pay the sum of 1*l.* per annum to the curacy fund of St. Michael's Church, Abertillery, and to pay the residue of the income to his daughter, Elizabeth Syrett, for her life, and after her death in trust for all her children who being sons should attain twenty-one, or being daughters should attain that age, or marry under that age, in equal shares; and after the death of his wife the testator gave and bequeathed his two leasehold villas in Roseberry Street, Abertillery, and also his leasehold villa known as Birchfield, Albany Road, Abergavenny, to his niece Mabel Morris, charged with the payment of the annual sum of 1*l.* per annum to the said curacy fund, and after the death of his wife the testator gave and bequeathed his three leasehold shops in Somerset Street, Abergavenny, to his trustees upon trust to pay the sum of 1*l.* per annum to the curacy fund, and 1*l.* per annum to another charity, and to hold the residue of the income in trust for all the children of his daughter, Elizabeth Syrett, on their respectively attaining the age of twenty-one years, or in case of daughters marrying under that age; and he directed that, in case of either of his said properties being incumbered at the time of his decease, the annual sum or sums charged in favour of the two charities should not be payable, and he gave, devised, and bequeathed all the rest and residue of his estate to his wife

EVE J. charged with the payment of his debts and funeral and testamentary expenses.
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WILLIAMS, The testator died on August 17, 1913, and his will was duly
In re. proved by the executors therein named. The testator's estate
CUNLIFFE was sworn for the purposes of probate at 3680*l.* 15*s.* 5*d.*,
r. consisting of cash in house 5*l.* 3*s.*, household furniture 60*l.*, and
WILLIAMS. the five leasehold properties, less mortgage debts. The debts
and funeral expenses amounted to 170*l.* 7*s.* 4*d.*

All the beneficiaries named in the will survived the testator, and his daughter, Elizabeth Syrett, had six children who were made defendants and were all infants.

The leasehold property in Queen Street, Abergavenny, was at the testator's death charged in favour of the Capital and Counties Bank, Abertillery, with payment of the sum of 318*l.* 2*s.*

The six leasehold messuages and stables in James Street, Abertillery, purported to be specifically bequeathed were, with other hereditaments, assigned to Elizabeth Virginia Williams by an indenture of October 3, 1888. By an indenture of January 1, 1889, she mortgaged the said premises to a permanent benefit building society to secure 300*l.*, and this was paid off on February 4, 1899.

By an indenture of August 25, 1909, the testator purported to mortgage the said premises to Margaret Lowe and Thomas Gwynne Powell to secure 400*l.* and interest, and this sum and interest still remained due.

The two leasehold villas in Roseberry Street, Abertillery, purported to be specifically bequeathed by the testator were purchased by and assigned to E. V. Williams by an indenture of May 21, 1890.

By an indenture dated August 14, 1905, the leasehold villa, Birchfield, Albany Road, Abergavenny, was assigned to the testator and E. V. Williams jointly.

By an indenture of August 15, 1905, the testator and E. V. Williams mortgaged the said premises to Albert Seymour Pearce to secure 400*l.* and interest. This sum still remained due.

The three leasehold shops in Somerset Street, Abergavenny, were assigned to E. V. Williams by the before-mentioned indenture of October 3, 1888. In the event of E. V. Williams electing

to take under the will of the testator, the question arose how, as between the various persons interested under the will, the sum of 400*l.* and interest secured by the mortgage of August 25, 1909, and the sum of 400*l.* and interest secured by the mortgage of August 15, 1905, and also the other debts of the testator and funeral and testamentary expenses ought to be borne.

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An originating summons was issued on December 10, 1913, by A. M. Cunliffe, as one of the executors of the will of the testator, asking (1.) whether the defendant E. V. Williams was bound to elect whether she would take under the will, or against it.

(2.) In case she elected to take under the will, that she might be ordered to convey to the plaintiff and herself jointly, upon the trusts of the will, all her estate and interest in

(a) the six leasehold messuages and stables in James Street, Abertillery;

(b) the two leasehold villas in Roseberry Street, Abertillery;

(c) the leasehold villa, Birchfield, Albany Road, Abergavenny;

(d) the three leasehold shops in Somerset Street, Abergavenny.

(3.) Whether the principal moneys and interest under the mortgage of August 25, 1909, to secure 400*l.* and interest ought as between the beneficiaries under the testator's will to be considered as a charge on the premises thereby mortgaged, or as an unsecured debt of the testator.

(4.) Whether the principal moneys and interest due under the mortgage of August 15, 1905, to secure 400*l.* and interest ought as between the beneficiaries under the said will to be considered as a charge on the premises thereby charged, or as an unsecured debt of the testator.

(5.) Whether any and if so what proportion of the testator's funeral and testamentary expenses and debts ought to be paid out of the several properties belonging to the defendant E. V. Williams, purported to be disposed of by the said will.

The testator's widow and the other beneficiaries under the will were made respondents.

In her affidavit E. V. Williams stated that she was willing that her property should be dealt with in accordance with the testator's will; that it was understood between the testator and herself that his property was hers and hers was his, and that the

EVE J. mortgage of August 25, 1909, and his will were made on this
1914 basis; that the former mortgage of the James Street property in
WILLIAMS, 1889 was made by her at the testator's request and for his benefit,
In re. and that she joined in the mortgage of Birchfield at his request,
CUNLIFFE and he received the whole of the mortgage money for his own
v. use. She was willing to assign her property mentioned in the
WILLIAMS. will to her co-trustee and herself jointly, to be held on the trusts
of the will.

H. McMaster, for the plaintiff. The gift to the curacy fund fails as the Queen Street property was charged. I ask that service on the charitable legatees may be dispensed with.

E. Ackroyd, for the testator's widow, Elizabeth Syrett, and Mabel Morris. The sum of 400*l.* charged upon the James Street property ought not to be charged on that property, which was specifically bequeathed. The widow was not a party to that mortgage and the property was hers. Locke King's Act does not apply. With regard to the other charge of 400*l.* on Birchfield, the widow was a party to that, and Locke King's Act must be taken to apply.

Courthope Wilson, for the six infant defendants. The mortgage debt on the James Street property should be borne by that property.

The election by the widow does not increase the estate of the testator for the purpose of paying his debts and funeral and testamentary expenses. The testator's own property should bear his own debts: *Laurie v. Clutton*. (1)

EVE J. I think, upon the evidence before me, I am bound to come to the conclusion that the mortgage subsisting on the James Street property at the date of the testator's death was created by him without the knowledge of the lady who is now his widow. I do not intend by that to imply that he did anything in fraud of her in any sense, because I gather from her affidavit that the confidence between herself and her late husband was such that she would have readily assented to whatever he had suggested ought to be done with the property. But at the time of his death

she was in a position to repudiate that mortgage. It was an ineffectual attempt to create a mortgage, by a deed to which she was not a party, of property vested in her.

In cases of election the equities of the parties have to be determined as at the death of the testator, and if the widow had elected to take against the will she would have retained this property free from the incumbrance.

She has elected to take under the will, and the first question is whether this property in the administration of the husband's estate stands primarily liable for payment of the mortgage debt. I do not think it does. What the lady brings in under her election is the interest she was entitled to at the time of her husband's death, that is to say, the property free from the incumbrance, and it is this which in my opinion passes to the beneficiaries under the husband's will.

The property referred to in the fourth question of the summons stands on a different footing. That was property of the widow mortgaged in a deed to which the lady was a party, and to this property Locke King's Act applies, and the mortgage is primarily payable out of the proceeds of sale.

The result of my decision on the first question is to increase the debts of the testator to a figure which is in excess of the residue, and the further question now arises whether, in apportioning the deficiency, the properties brought in by reason of the widow's election are to be included and made to bear their rateable proportion of such deficiency, or whether the whole deficiency is to be borne by the testator's own property. The foundation and principles of election are thus stated by Lord Hatherley in *Cooper v. Cooper*. (1) After pointing out that the foundation of election is that no one shall claim under and in opposition to the same instrument, he continues: "The main principle was never disputed, that there is an obligation on him who takes a benefit under a will or other instrument to give full effect to that instrument under which he takes a benefit; and if it be found that that instrument purports to deal with something which it was beyond the power of the donor or settlor to dispose of, but to which effect can be given by the concurrence of him who

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(1) L. R. 7 H. L. 53, 69.

EVE J. receives a benefit under the same instrument, the law will impose on him who takes the benefit the obligation of carrying the instrument into full and complete force and effect." I think it results from those principles that where by reason of an election to take under the instrument property has been set free to pass under the instrument, that property becomes subject to all the incidents it would have been subject to had it been throughout the property of the donor. Accordingly, in my opinion, the property which was in fact the widow's property must, in the circumstances, contribute *pari passu* with the testator's property in discharging his debts.

Solicitors : *Cornish & Forfar, Liverpool, for Hodgens & Cunliffe, Abergavenny.*

G. M.

SARGANT J. KINGSTON-UPON-HULL CORPORATION *v.* NORTH
EASTERN RAILWAY COMPANY.

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Nov. 25, 26,

27;

Dec. 8.

[1914 K. 32.]

Local Government—Sewer—Single Private Drain—Several Houses belonging to one Owner—Highway—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 13, 41—Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19—Kingston-upon-Hull Corporation Act, 1903 (3 Edw. 7, c. ccxvi.), s. 49.

The Kingston-upon-Hull Corporation Act, 1903, s. 49, enacts by sub-s. 1 that "where two or more houses or premises are connected with a single private drain which conveys their drainage into a public sewer" the corporation shall have all the powers conferred by s. 41 of the Public Health Act, 1875; by sub-s. 2 that s. 19 of the Public Health Acts Amendment Act, 1890, shall cease to be in force within the city, and by sub-s. 3 that for the purposes of this section the expression "drain" includes a "drain used for the drainage of more than one building whether owned or occupied by the same person or not." By the Public Health Act, 1875, s. 4, "drain" means "any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a . . . sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed":—

He'd, that the true meaning of s. 49 is that where the drainage pipe provided in common for a group of houses or properties is as exclusive and private in relation to those properties as the statutorily defined "drain" is in relation to the single house which it serves, then the liability of the owner or owners of those properties for nuisance arising

from that common drainage is analogous to or corresponds with the liability of the owner of a single house for the statutory drain serving that house only. SARGANT J.

The defendants were the owners of a roadway, being a cul-de-sac, having twenty cottages on one side and ten on the other and communicating with their back yards only. As the result of a notice under s. 23 of the Public Health Act, 1875, served on them in 1876, the defendants laid a conduit or 12-inch pipe under the whole length of the roadway, the greater part of which was outside the limit mentioned in s. 23 of 100 feet from the public sewer with which it communicated. This conduit was used only for surface water, including slops from the back yards of the cottages. The smaller conduits from the gullies in these back yards were 4-inch pipes, and met as a rule in pairs just within the curtilages of the cottages and were then carried by 6-inch conduits into the main conduit. As the result of another notice under s. 94 of the same Act, served on them in 1877, the defendants dealt with the surface water of the roadway by constructing seven gullies along the length of the roadway with 6-inch conduits leading into the main conduit. The land on which the roadway was built, the cottages on each side, and the land at the closed end had throughout been the property of the defendants. The plaintiffs, purporting to act under s. 49 of the Kingston-upon-Hull Corporation Act, 1903, and s. 41 of the Public Health Act, 1875, had recently required the defendants to abate a nuisance in respect of the drainage of the cottages and roadway, and having executed the necessary works themselves now claimed a declaration of charge upon the property for the costs of the work in connection with the main conduit.

The question was whether the main conduit was a "single private drain" within s. 49 of the Kingston-upon-Hull Corporation Act, 1903, and as incidental thereto two further questions were raised: (1.) whether the roadway had ever been dedicated to the public as a highway, and (2.) whether the conduit was vested in the plaintiffs or fell within the exceptions contained in s. 13 of the Public Health Act, 1875, as being made either for private profit or under the defendants' railway Acts:—

Held, that the roadway was a highway though not repairable by the public.

Held, also, that the case did not fall within the exceptions contained in s. 13 of the Public Health Act, 1875.

Held, also, that the conduit was notwithstanding a "single private drain" within s. 49, and that the plaintiffs were accordingly entitled to a declaration of charge upon the property for the costs of the work in connection therewith.

WITNESS ACTION.

This action was brought by the plaintiffs as the urban sanitary authority within the city and county of Kingston-upon-Hull claiming a declaration that a sum of 91*l.* 13*s.* 9*d.*, being the expenses incurred by them in executing certain works in connection

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SARGANT J. with a conduit under a roadway, together with interest at 5l. per cent. thereon from April 9, 1913, was until payment thereof a charge upon certain premises of the defendants.

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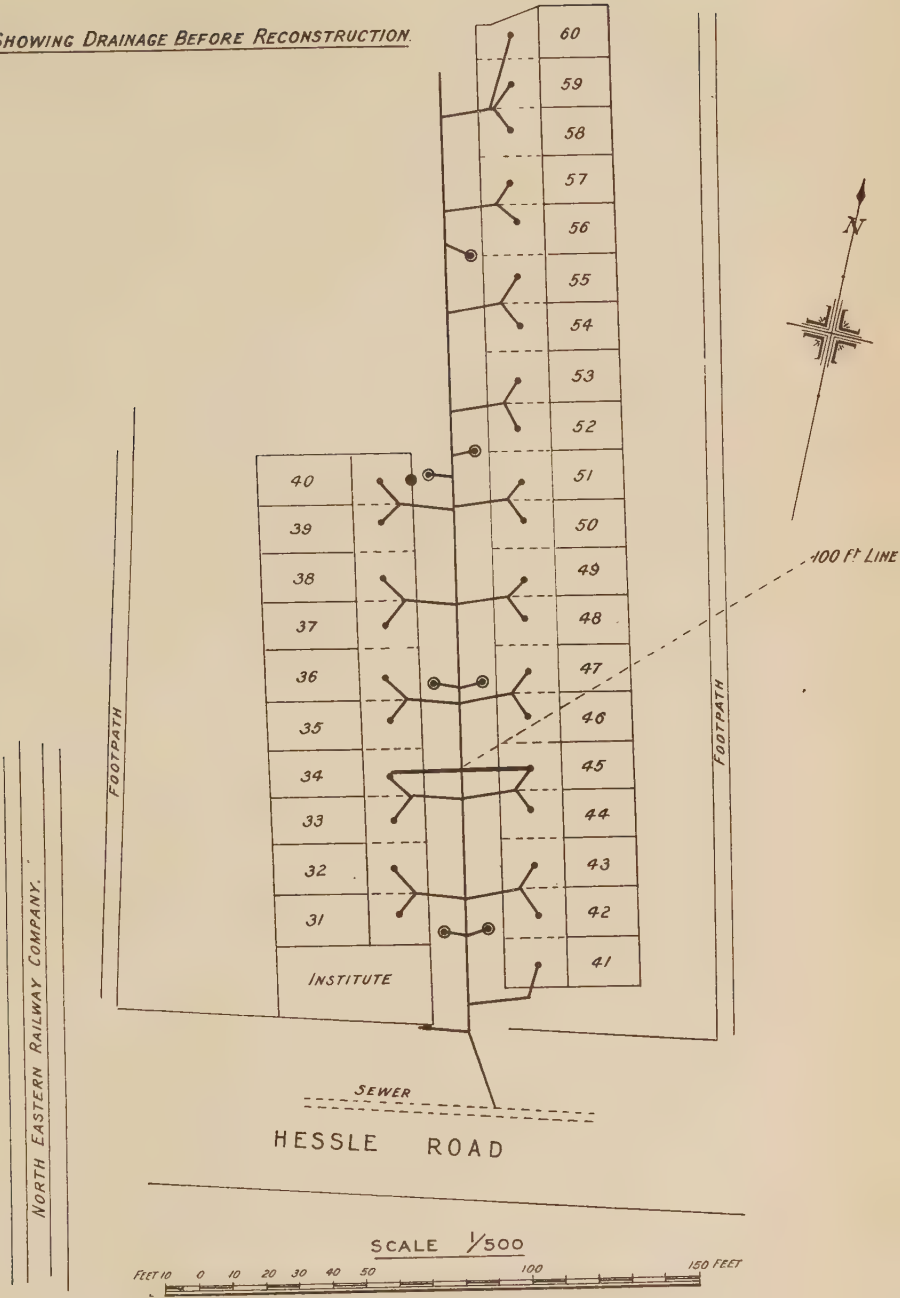
The question depended upon the true meaning and effect of s. 49 of the Kingston-upon-Hull Corporation Act, 1903. (1)

The following statement of facts is taken from his Lordship's written judgment:—"The roadway in question is between 300 and 400 feet in length, leads north from a considerable thoroughfare called Hessle Road, is metalled, flagged, and paved like the general run of small streets in the vicinity, and has on the east side along its whole length a continuous line of twenty cottages, and on its west side along rather more than half its length an institute and a continuous line of ten cottages. It is a cul-de-sac, being closed at its northern end by a wall. It forms the only access by road and for vehicles to all these cottages, but communicates with their back yards only. The front access to each row of the cottages is on the opposite side, and is by means of a footway on which the front gardens of each row of cottages abut. The roadway and most of the cottages were constructed under enabling statutory powers in or about the year 1861, a few cottages being built somewhat later. The land on which the roadway is built, the cottages on each side, and the land immediately to the north have throughout formed the property of the railway company. The cottages have never had water closets, but have throughout depended on earth closets which are emptied by the corporation carts coming along the roadway. The conduit is therefore used only for surface water, including slops from the back yards of the cottages on each side. The smaller conduits from the gullies in these back yards, which are four inches in diameter, meet as a rule in pairs just within the curtilage of the cottages, and are then carried by 6-inch conduits into the road conduit, which is itself twelve inches in diameter. The surface water of the roadway itself is dealt with by some seven gullies along the length of the roadway, and by 6-inch conduits leading into the main conduit. The system of drainage is shown on a plan which has been agreed between the agents of the parties. (2)

(1) See note on p. 470, post.

(2) See a copy of this plan opposite.

PLAN SHOWING DRAINAGE BEFORE RECONSTRUCTION.



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SARGANT J. The 12-inch conduit and the back yard gullies and the conduits in connection therewith were constructed by the railway company in consequence of a notice given to them under the Public Health Act, 1875, on June 28, 1876. This notice was authorized by the fasciculus of sections from s. 13 to s. 41 inclusive. It of course did not, and could not, require the railway company to connect with the main drain in Hessle Road any cottages lying more than 100 feet from that main drain, but in the case of cottages outside that distance it could and did require the railway company to make sufficient covered cesspools. The railway company, however, no doubt wisely, went beyond the precise terms of the notice and in fact constructed the 12-inch conduit along the whole length of the road, except a few feet at its north end, and by its means connected the whole of the cottages with the main drain in Hessle Road. The construction of the seven road gullies, and the conduits in connection therewith, as well as the paving and flagging of the roadway, took place in consequence of a notice from the corporation dated December 17, 1877. This notice was given under s. 94 of the Public Health Act, 1875, and required the railway company to abate the nuisance arising from the roadway not being paved or flagged or properly drained.

"I should add to my statement of the facts that originally the roadway was enclosed on the south by three gates, but that some few years after its construction, probably between the years 1865 and 1870, and some considerable time before the time when the gates would in the natural course have fallen into decay, these gates ceased to exist, and must I think have been removed. Since that time, except for the roadway being a cul-de-sac, there has been nothing to distinguish it in appearance from any ordinary street in the neighbourhood, or to prevent its user by any member of the public who might wish to make use of it, though no doubt there could in fact hardly be any persons desirous of so using it except the occupants of the cottages and those having, or desirous of having, some transaction with them. Hawkers of coals, fish, and other commodities, occasional organ-grinders, and other like persons, have from time to time made use of the road; and for some years during which a service of motor-buses had its

terminus near the end of the roadway, the motor-buses were accustomed to back a few feet along the roadway for the purpose of making the necessary turn more conveniently than could have been done within the limits of Hessle Road alone. On the other hand no public expenditure has been made on the roadway for repair, scavenging, or lighting.

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“Recently, namely, on October 30, 1912, the corporation, purporting to act under s. 41 of the Public Health Act, 1875, and s. 49 of the Kingston-upon-Hull Corporation Act, 1903, required the railway company to abate a nuisance in connection with the drainage system of the cottages and roadway; and on non-compliance with the notice did the work themselves at a cost of 139*l.* 6*s.* 6*d.* The railway company repaid the corporation the sum of 47*l.* 12*s.* 9*d.*, which represented the cost of the work in connection with the drainage of the back yards, and also that in connection with the road gullies, though here the railway company allege that they were under a mistake of fact. But the railway company have declined to pay the balance of 91*l.* 13*s.* 9*d.* which represents the cost of work, speaking broadly, in connection with the 12-inch conduit, and it is in respect of this sum that the present claim arises. The railway company have not thought it worth while to counterclaim for any small sum paid by them which represents work in connection with the street gullies, and, so far as this goes, merely make a claim, which is not disputed by the corporation, that their payment of this sum shall not be taken as prejudicing their position with regard to the main sum of 91*l.* 13*s.* 9*d.*”

*P. O. Lawrence, K.C.*, and *R. A. Glen*, for the plaintiffs. The conduit in question is a “single private drain” within s. 49. It was constructed solely for the accommodation of these houses and cannot be used by any other person for any other purposes. If the question of the defendants’ liability had to be decided under the Public Health Act, 1875, alone, no doubt the conduit is not a statutory drain as defined by s. 4 of that Act; but the deficiency in that respect of the Public Health Act, 1875, was remedied to meet the case of plural owners by s. 19 of the Public



SARGANT J. Health Acts Amendment Act, 1890, and is still further remedied by s. 49 of the Kingston-upon-Hull Corporation Act, 1903, so as to apply (1.) where the two or more buildings are owned by the same person, and (2.) so as to apply not only to houses but to "premises," which term by s. 4 of the Public Health Act, 1875, includes land as well as houses. Even if the conduit is vested in the local authority, that does not relieve the defendants from the obligation in respect of a private drain imposed by s. 49: *Pemsel v. Tucker*. (1) The necessary attributes of a single private drain are defined by Lord Atkinson in *Wood Green Urban Council v. Joseph* (2) with reference to s. 19 of the Public Health Acts Amendment Act, 1890, and equally apply to s. 49 of the corporation's Act. The expression "single private drain" is further explained in *Thompson v. Eccles Corporation* (3) and *Bradford v. Eastbourne Corporation*. (4)

So far as the point is material, there has been no dedication of this roadway as a highway. The evidence falls short of what is required to prove dedication in the case of a cul-de-sac such as this: *Whitehouse v. Hugh* (5); *Attorney-General v. Richmond Corporation* (6); *Attorney-General v. Antrobus* (7); *Cubitt v. Maxse* (8); *Woodyer v. Hadden* (9); *Wood v. Veal*. (10)

[SARGANT J. referred to *Abercromby v. Fermoy Town Commissioners*. (11)]

Mere user of a cul-de-sac without public expenditure is not enough. Moreover the power of a railway company to dedicate land to the use of the public is questionable: *Mulliner v. Midland Ry. Co.* (12) The conduit is not a sewer vested in the plaintiffs, since it falls within the first exception contained in s. 13 of the Public Health Act, 1875, as being made for private profit—*Phillimore v. Watford Rural Council* (13)—and also within the second exception as being made under the Acts relating to

(1) [1907] 2 Ch. 191, 203, 204.

(2) [1908] A. C. 419.

(3) [1905] 1 K. B. 110, 125.

(4) [1896] 2 Q. B. 205, 215.

(5) [1906] 2 Ch. 283, 285, per Romer L.J.

(6) (1903) 89 L. T. 700; 2 L. G. R. 628.

(7) [1905] 2 Ch. 188, 206, per Farwell J.

(8) (1873) L. R. 8 C. P. 704.

(9) (1813) 5 Taunt. 126, 139.

(10) (1822) 5 B. & Al. 454.

(11) [1900] 1 I. R. 302.

(12) (1879) 11 Ch. D. 611.

(13) [1913] 2 Ch. 434.

the railway of the defendants, since the works were in the nature of accommodation works going beyond what could be insisted on by the local authority: *London and North Western Ry. Co. v. Runcorn Rural Council* (1); but even if the conduit is not within those exceptions, this does not really affect the question, since its status as a single private drain under s. 49 remains unaffected. [They also referred to *Hollywood Urban Council v. Grainger*. (2)]

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*Walter Ryde, K.C., and E. M. Konstam*, for the defendants. The conduit in question is not a single private drain within s. 49 of the Kingston-upon-Hull Corporation Act, 1903. In the Public Health Act, 1875, the definition of a drain takes the form of exceptions from the definition of a sewer, and under that Act the exception is limited to any drain used for the drainage of one building only. Under s. 19 of the Public Health Acts Amendment Act, 1890, the exception was extended to the case of more than one building belonging to different owners, and by the corporation's Act of 1903, s. 49, the exception is extended to more than one building whether belonging to more than one owner or not. The word "premises" in s. 49 means something within the same curtilage as the messuage or building; but in the present case the seven gullies which drain the roadway are quite distinct and prevent the conduit from being a single private drain within s. 49. The roadway is a statutory "street"—whether dedicated to the public or not—and is entirely outside the curtilages of the cottages. The conduit is a sewer vested in the plaintiffs, since the case does not fall within any of the exceptions contained in s. 13: *Ferrand v. Hallas Land and Building Co.* (3); *Sykes v. Sowerby Urban Council*. (4) The cases of *London and North Western Ry. Co. v. Runcorn Rural Council* (1) and *Phillimore v. Watford Rural Council* (5) bear no resemblance to the present case.

[SARGANT J. You say that the conduit is not a single private drain within s. 49, first, because it is fed by gullies which carry off water not coming from any building or the curtilage of any

(1) [1898] 1 Ch. 34, 561.

(3) [1893] 2 Q. B. 135.

(2) [1913] 2 I. R. 126.

(4) [1900] 1 Q. B. 584.

(5) [1913] 2 Ch. 434.

SARGANT J. building, and secondly because it is fed by seven gullies vested in the local authority ?]

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Yes. Moreover the word "private" imports that the drain is laid in private land according to ordinary parlance: *Self v. Hove Commissioners* (1); *Bradford v. Eastbourne Corporation* (2); *Seal v. Merthyr Tydfil Urban Council* (3) (disapproving *Hill v. Hair* (4)); *Thompson v. Eccles Corporation* (5); *Wood Green Urban Council v. Joseph*. (6)

In the present case the conduit is laid in a highway, and if the public has a right of access that destroys the privacy: *Seal v. Merthyr Tydfil Urban Council*. (7) The evidence is sufficient to establish a dedication to the public whether or not the roadway is repairable by the public at large: *Whitehouse v. Hugh* (8); *Rugby Charity Trustees v. Merryweather* (9); *Woodyer v. Hadden*. (10) The dedication of a highway is not ultra vires a railway company: *Grand Junction Canal Co. v. Petty*. (11) [He also referred to Highway Act, 1835, s. 23; Public Health Act, 1875, ss. 15, 19, 23, 91, 150; and *Bonella v. Twickenham Local Board of Health*. (12)]

*P. O. Lawrence, K.C.*, in reply. Sect. 19 of the Public Health Acts Amendment Act, 1890, and s. 49 of the corporation's Act of 1903 do not contain extended definitions by way of exception from "sewer." They are positive enactments, and the fact that the conduit is a sewer vested in the plaintiffs which they would otherwise be bound to repair under s. 15 of the Public Health Act, 1875, does not prevent the operation of s. 19 of the Public Health Acts Amendment Act, 1890, or in the present case of s. 49 of the corporation's Act, which are intended to shift the burden in such a case and throw it on the owner or owners of the property. The fact that the conduit picks up surface water from the road might be material under s. 19 of the Public Health Acts Amendment Act, 1890, but is immaterial under s. 49 of the

(1) [1895] 1 Q. B. 685.

(2) [1896] 2 Q. B. 205.

(3) [1897] 2 Q. B. 543.

(4) [1895] 1 Q. B. 906.

(5) [1904] 2 K. B. 1.

(6) [1907] 1 K. B. 182; [1908] A. C. 419.

(7) [1897] 2 Q. B. 543, 545, per Cave J.

(8) [1906] 2 Ch. 283, 285.

(9) (1790) 11 East, 375, n.

(10) 5 Taunt. 139.

(11) (1888) 21 Q. B. D. 273.

(12) (1887) 18 Q. B. D. 577.

corporation's Act, because that section goes further than s. 19 and extends to "premises," which word by virtue of s. 4 of the Public Health Act, 1875, includes land and hereditaments of any tenure and therefore includes this roadway which, whether a public highway or not, is the property of the defendants. There is no sound reason for limiting "premises" in s. 49 to premises in the same curtilage as the houses.

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Assuming the roadway to be a public highway, this does not affect its privacy for the present purpose. It still remains private land notwithstanding the rights of the public. The test of privacy is laid down by Wills J. in *Bradford v. Eastbourne Corporation* (1) and Lord Atkinson in *Wood Green Urban Council v. Joseph*. (2) The dictum of Cave J. in *Seal v. Merthyr Tydfil Urban Council* (3) goes too far. [He also further cited on the question of dedication *Kirby v. Paignton Urban Council* (4) and *Reg. v. Inhabitants of Hawkhurst*. (5)]

*Cur. adv. vult.*

Dec. 8. SARGANT J. The question here is whether the plaintiffs, the Corporation of Kingston-upon-Hull, are entitled to enforce a charge against land and houses of the defendant railway company for expenses incurred by the corporation in remedying a nuisance arising from the defective condition of a conduit lying under a roadway within the borough of Hull. The liability of the railway company depends upon whether the conduit in question is or is not a single private drain within s. 49 of the Kingston-upon-Hull Corporation Act, 1903.

The material facts are as follows. [His Lordship stated the facts as above set out and continued:] Before dealing with the main question, namely, whether the 12-inch conduit is a single private drain within s. 49 of the plaintiffs' Act of 1903, I will consider two subsidiary questions having some bearing on this main question, namely, first, in whom the 12-inch conduit is vested, and, secondly, whether the roadway over this conduit has or has not become a public highway.

As to the first point it was urged by Mr. Lawrence for the

(1) [1896] 2 Q. B. 215.

(3) [1897] 2 Q. B. 543, 545.

(2) [1908] A. C. 419, 428.

(4) [1913] 1 Ch. 337.

(5) (1863) 27 J. P. 262.



SARGANT J. corporation that although prima facie the 12-inch conduit  
 1914 was a sewer under the Public Health Act, 1875, and so vested  
 KINGSTON- in the corporation under s. 13 of that Act, yet that it fell within  
 UPON-HULL either the first exception to that section as being made for  
 CORPORATION private profit, or under the second exception as done under  
 v. statutory authority. But in my judgment neither exception  
 NORTH applies to this 12-inch conduit. The case of *Ferrand v.*  
 EASTERN *Hallas Land and Building Co.* (1) shows that a sewer made  
 RAILWAY. by a landowner for draining his own land is not made for profit  
 within the first exception. The profit is too indirect, and if the  
 exception were read so broadly as this it would embrace the great  
 majority of sewers. And as regards the second exception, I  
 cannot think it applies to a case where, though land may have  
 been acquired and buildings enclosed under statutory powers, the  
 sewer was constructed, not in pursuance of any special statutory  
 obligation affecting the railway company as such, but in pursuance  
 of general statutory obligations to which the railway company  
 were no more liable than any other landowner. The case of  
*London and North Western Ry. Co. v. Runcorn Rural Council* (2)  
 seems to me clearly distinguishable on this ground.

The question whether the roadway has or has not become a  
 public highway is a more doubtful one. I fully recognize the  
 difficulty there ordinarily is in showing that a cul-de-sac has  
 become a highway in the absence of evidence of repair at the  
 public expense, or other expenditure of public money, though I  
 think that the absence of repair at the public expense has not  
 been such strong negative evidence since by the operation of s. 23 of  
 the Highway Act, 1835, dedication to the public has not in itself  
 involved repair at the public expense. But here not only is there  
 an inference to be drawn from the removal of the gates, but there  
 has been for nearly fifty years in a street over one hundred  
 yards in length and containing thirty cottages an absolutely  
 unrestricted liberty of user for any members of the public desirous  
 of availing themselves of such user. The case seems to be at  
 least as strong a case as that of *Rugby Charity Trustees v.*  
*Merryweather* (3), where there was apparently no evidence of

(1) [1893] 2 Q. B. 135.

(2) [1898] 1 Ch. 34, 561.

(3) 11 East, 375, n.

expenditure of public money on repair, lighting, &c., and that, SARGANT J. of course, long before 1835. And the observation made there as to the conduct of the owners of the street amounting otherwise to a trap for trespassers is very applicable here; for in this case I think that the hawkers coming on the chance of getting business, the organ-grinders coming on the chance of getting coppers, and the motor-buses using an apparently public roadway for turning purposes, must all have been trespassers if the roadway had not become a public highway. It should, however, be added that, although the roadway has become, as I think it has, a public highway, it is quite clear that it has not become repairable by the public, and so, though undoubtedly a "street" within the Public Health Act, 1875, has not vested in the corporation.

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I now arrive at the main question, namely, whether this 12-inch conduit is a single private drain within the 49th section of the corporation's Act of 1903. This section, which is in lieu of s. 19 of the Public Health Acts Amendment Act, 1890, is drawn on the same general lines as that section, and must obviously be construed on the same general principles; but it differs from and goes further than s. 19 in several respects, and particularly in extending to two important classes of cases not within that section. For in the first place it extends to cases where the two or more properties served are owned and occupied by the same person; and in the second place it extends not merely to cases where the properties so served are buildings, but also to the case where one or more of the properties are merely premises," or, under the interpretation section of the Act of 1875, "lands or hereditaments of any tenure" as well as messuages or buildings. Mr. Ryde indeed argued that the context in sub-s. 1 and sub-s. 3 of s. 49 ought to prevent this prima facie meaning of the word "premises" from being given to it, and ought to restrict the cases provided for by the section to cases in which all the property drained consists of buildings. But I see no sufficient reason for so restricting this express statutory meaning, or for saying that a pipe which drains both a house and also a piece of land is not used for the drainage of "more than one building." "More than one building" seems to me a wider expression than "more buildings than one," and

SARGANT J. indeed is an expression precisely and completely abrogating that part of the definition of a drain in the Act of 1875 which requires that it shall be used for the drainage of "one building only."

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Further, the 12-inch conduit fulfils the test laid down by Lord Atkinson in *Wood Green Urban Council v. Joseph* (1), of having been constructed in fulfilment of requirements under the fasciculus of sections in the Public Health Act, 1875, which deals with compulsory drainage. For, though the railway company were only bound to connect with the main sewer in Hessle Road such of their cottages as lay within 100 feet of that sewer, they were also bound at least to connect the others with proper cesspools. And, though they complied with their obligations as to these cottages in a rather different way from that pointed out, namely, by an extension of the 12-inch conduit north beyond the 100 feet limit, I do not think that this extension of the conduit is to be any the less regarded as having been made in pursuance of these statutory requirements within the meaning of Lord Atkinson's judgment.

There is, therefore, nothing to exclude the 12-inch conduit from the operation of s. 49 if it is a "single private drain," or, indeed, if it is a "private drain," for the word "single" is obviously used in mere contradistinction to the words "two or more," and is really equivalent to "common." Whether it is a private drain has been the real difficulty of the case and that to which attention has mainly been directed. Now here it seems to me that the true meaning of this section is that where a drainage pipe, provided in common for a group of houses or properties, is as exclusive and private in relation to those properties as the statutorily defined "drain" is in relation to the single house which it serves, then the liability of the owner or owners of those properties for nuisance arising from that common drainage pipe shall be analogous to, or correspond with, the liability of the owner of a single house for the statutory drain serving that house only. Here, if the gates at the south end of the roadway had been kept up and the complete privacy of the roadway maintained, I think that the 12-inch conduit would have been as exclusive and private a system of drainage

for the cottages and land on each side of the roadway and for the roadway itself (which certainly seems to me within the definition of the word "premises" in the Act of 1875) as the single drain of a single house is for that house. And it appears also to fulfil the tests of privacy given in the following passage from the judgment of Wills J. in the *Eastbourne Case* (1), namely, "The public sewer is obviously meant here to indicate a sewer which serves the public generally, and has or may have an indefinite number of houses connected with it, either directly, or because branch sewers come into it; whereas the 'private drain' serving two or more houses is that of which the natural use is confined to those houses and with which other houses belonging to other owners could not be connected without the consent of the persons through whose land it runs."

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Is there then any real difference caused by the fact, if fact it be, that the public have acquired rights of highway over the surface of the roadway? It appears to me that this question must be answered in the negative. This acquisition of rights of highway has still left the surface of the roadway vested in the railway company, and left them under the obligation of repairing, scavenging, and draining that surface. It has given no further right to any person to make connections with the sewer against the will of the railway company as the owners of the whole of the surrounding land. It leaves the railway company in all material respects as much the sole masters of the situation and as completely and exclusively entitled to the facilities afforded by the 12-inch conduit as if no public rights of highway had ever been acquired over the roadway.

The result is that the plaintiffs are entitled to recover the moneys they claim, and I propose to make an order establishing the charge claimed by them, and giving them the costs of the action.

Solicitors: *Sharpe, Pritchard & Co., for H. A. Learoyd, Hull; R. F. Dunnell.*

NOTE.—Kingston-upon-Hull Corporation Act, 1903:—

Sect. 4: "The several words and expressions to which . . . by the Public

(1) [1896] 2 Q. B. 205, 215.



SARGANT J. Health Acts meanings are assigned shall in this Act have the same respective meanings unless there be something in the subject or context repugnant to or inconsistent with such construction . . . .”

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Sect. 49: “(1.) Where two or more houses or premises are connected with a single private drain which conveys their drainage into a public sewer the corporation shall have all the powers conferred by section 41 of the Public Health Act 1875 and the corporation may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses in such proportions as shall be settled by the surveyor or (in case of dispute) by arbitration under the Public Health Act 1875 or by a court of summary jurisdiction and such expenses shall be recoverable summarily as a civil debt or the corporation may declare them to be a private improvement expense and may recover them accordingly.

“(2.) Section 19 of the Public Health Acts Amendment Act 1890 shall cease to be in force within the city.

“(3.) For the purposes of this section the expression ‘drain’ includes a drain used for the drainage of more than one building whether owned or occupied by the same person or not.”

Public Health Act, 1875, s. 4: “In this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them; that is to say (*inter alia*)

“‘Lands’ and ‘Premises’ include messuages buildings lands easements and hereditaments of any tenure:

“‘Street’ includes any highway . . . . and any road lane footway square court alley or passage whether a thoroughfare or not:

“‘Drain’ means any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed:

“‘Sewer’ includes sewers and drains of every description, except drains to which the word ‘drain’ interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act:”

Sect. 13: “All existing and future sewers within the district of a local authority . . . . except (1.) sewers made by any person for his own profit, or by any company for the profit of the shareholders; and (2.) sewers made and used for the purpose of draining, preserving, or improving land under any local or private Act of Parliament . . . . shall vest in and be under the control of such local authority . . . .”

Sect. 15: “Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act.”

Sect. 23 empowers the local authority where any house is without a sufficient drain to require the owner or occupier to make a covered drain or drains emptying into any sewer which the local authority are entitled to use

and which is not more than 100 feet from the site of such house; but if no such means of drainage are within that distance, then into such cesspool or other place as they direct.

Sect. 41 enables the local authority as therein provided to empower their surveyor to examine drains, &c., and if the drains require alteration or amendment to give notice requiring the owner or occupier to do the necessary works, and in default to execute such works themselves.

Sect. 94 and following sections enable the local authority to serve notice requiring the abatement of a nuisance, and take the necessary steps for the abatement thereof.

Public Health Acts Amendment Act, 1890:—

Sect. 19: “(1.) Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under section forty-one of the Public Health Act 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses in such shares and proportions as shall be settled by their surveyor or (in case of dispute) by a court of summary jurisdiction.

“(2.) Such expenses may be recovered summarily or may be declared by the urban authority to be private improvement expenses under the Public Health Acts, and may be recovered accordingly.

“(3.) For the purposes of this section the expression ‘drain’ includes a drain used for the drainage of more than one building.”

A. C.

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1915

Feb. 18,

*In re* SMELTING CORPORATION.SEAUER *v.* THE COMPANY.

[1914 S. 2847.]

*Company—Debenture Stock—Trust Deed—Distribution of Assets by Trustees—  
Partly paid Stock—Rights of Holders.*

In 1902 a company issued debenture stock payable by the instalments mentioned in the application form, which were all called up by May, 1903.

The trust deed securing the stock provided for a distribution of the net proceeds of any sale thereunder first in payment of arrears of interest in proportion to the amount due, and secondly in payment of principal in proportion to the stock held by the stockholders.

All the stockholders were entered on the register and received certificates for the full amount of stock allotted, but several had not paid their instalments.

The trustees had realized the security and were distributing the assets, and the question arose whether the partly paid stock holders could participate without notionally bringing in their unpaid instalments in accordance with the principle of *Cherry v. Boulton* (1839) 4 My. & Cr. 442:—

*Held*, that the transaction simply amounted to a contract to make a loan by instalments to the company on the security of debenture stock, which contract prior to the Companies Act, 1907 (7 Edw. 7, c. 50), s. 16, re-enacted by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 105, was not enforceable either in debt or specific performance, but only in damages: *South African Territories v. Wallington* [1898] A. C. 309.

As therefore the unpaid instalments did not constitute a debt to the company or the trustees, the principle of *Cherry v. Boulton* was inapplicable, and the partly paid stock holders were entitled to a rateable distribution in respect of the loans they had actually made.

*In re Akerman* [1891] 3 Ch. 212; *In re Abrahams* [1908] 2 Ch. 69; and *In re Rhodesia Goldfields* [1910] 1 Ch. 239 discussed.

## ORIGINATING SUMMONS.

The above company was incorporated on June 11, 1902. On June 30, 1902, the board resolved to create 350,000*l.* first mortgage debenture stock. This stock carried 5 per cent. interest and was to be redeemed on January 1, 1916, or earlier.

On August 1, 1902, a trust deed securing the stock was executed. By clause 2 the corporation acknowledged that it was indebted to the trustees in the sum of 350,000*l.* carrying 5 per

cent. interest from January 1, 1902, and by clause 8 it charged ASTBURY J. its undertaking and assets (including its uncalled capital) in favour of the trustees by way of a floating security.

Clause 13 provided that the trustees should hold the moneys to arise from any sale upon trust that they should in the first place pay costs and expenses and should apply the residue of such moneys first "in or towards payment to the stockholders *pari passu* with the proportion to the amounts due to them respectively of all arrears of interest remaining unpaid on the stock held by them respectively"; secondly "in or towards payment to the stockholders *pari passu* in proportion to the stock held by them respectively and without any preference or priority of issue or otherwise howsoever of all the principal moneys and premiums owing in respect of the stock held by them respectively and that whether the same principal moneys and premiums shall or shall not then be presently payable"; thirdly "shall pay the surplus of any of such moneys to the corporation or its assigns." There were in fact no premiums payable.

Clause 17 provided that upon any payment to the stockholders on account of principal the stock certificate must be produced to the trustees, who should cause a memorandum of the amount and date of payment to be indorsed thereon. The schedule (condition 5) provided that every stockholder would be entitled to a certificate stating the amount of stock held by him.

Stock to the amount of 285,623*l.* was issued accordingly, payable 5*s.* in the pound on application, 5*s.* on allotment, and 10*s.* when called. These terms were stated in the application forms, and all applications were made on that footing.

The whole amount was in fact called up, namely, 5*s.* on December 20, 1902, and 5*s.* on May 1, 1903. The calls were not all paid and in some instances the allotment money was not paid, so that in the result the existing stock stood as follows:—

|          |   |   |   |   |   |                   |
|----------|---|---|---|---|---|-------------------|
| £280,715 | . | . | . | . | . | Fully paid        |
| 275      | . | . | . | . | . | 15 <i>s.</i> paid |
| 1,841    | . | . | . | . | . | 10 <i>s.</i> paid |
| 2,792    | . | . | . | . | . | 5 <i>s.</i> paid  |
| <hr/>    |   |   |   |   |   |                   |
| £285,623 |   |   |   |   |   |                   |

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ASTBURY J. All the stockholders were entered on the register and received certificates for the full amount of stock allotted to them.

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In July, 1906, the trustees took possession, as the company was not carrying on the business profitably, and on January 18, 1907, the company was wound up voluntarily by special resolutions of December 20, 1906, and January 18, 1907.

Since 1907 the trustees had been making sales of the company's property and out of the proceeds had made various distributions amounting altogether to 3s. 6d. in the pound amongst the fully paid stock holders in proportion to their stock, and they proposed shortly to make a final distribution of 4d. in the pound amongst them.

The question arose whether the partly paid stock holders ought not to have shared in these distributions, and to what extent. The amount in the trustees' hands was quite sufficient for purposes of adjustment if necessary.

On October 8, 1914, the trustees issued this summons to determine the point.

*Dighton Pollock*, for the trustees.

*Hon. Frank Russell, K.C.*, and *Johnston Edwards*, for the fully paid stock holders. The partly paid stock holders can only claim as cestuis que trust under the trust deed. They must therefore notionally bring in what they have undertaken to contribute to the trust fund before they can participate in the distribution: *Cherry v. Boulbee* (1); *In re Akerman* (2); *In re Brown & Gregory, Ltd.* (3); *In re Rhodesia Goldfields.* (4) In that case they will in fact get nothing. The Court is asked to decide the broad question without troubling about arrears of interest which would involve further inquiry.

*Cunliffe, K.C.*, and *Sheldon*, for the partly paid stock holders. The partly paid stock holders might claim to prove for the full amount of their stock with perhaps a limitation of their dividend to the amount they actually paid. But they are quite content to prove for the latter amount only.

(1) 4 My. & Cr. 442.

(2) [1891] 3 Ch. 212.

(3) [1904] 1 Ch. 627; [1904] 2 Ch.

448.

(4) [1910] 1 Ch. 239.

There is no debt owing to the company or the trustees. The ASTBURY J. transaction merely amounted to a contract to make a loan to the company on the security of debenture stock, and as it took place before the Companies Act, 1907, s. 16, re-enacted by the Companies (Consolidation) Act, 1908, s. 105, the company's only remedy lay in damages and not in debt or specific performance: *South African Territories v. Wallington*. (1)

The principle of *Cherry v. Boulton* (2) only applies to debts presently payable, including statute-barred debts: *Hallett v. Hallett* (3); *Ex parte Theys* (4); *In re Akerman* (5); *In re Brown & Gregory, Ltd.* (6); *In re Wheeler* (7); *In re Abrahams* (8); *In re Sewell* (9); *In re Rhodesia Goldfields*. (10) The principle cannot be extended to a case where there is nothing in the nature of a debt at all.

*Shebbeare*, for the company.

*Hon. Frank Russell, K.C.*, in reply.

ASTBURY J. (after stating the facts). One would imagine that this point must have arisen before, but apparently there is no direct authority on the point, and the question which has been argued is whether the principle of *Cherry v. Boulton* (2) applies to the present case. That principle may be shortly stated as follows. A person who owes money to an estate, being bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass without first making the contribution which completes it.

Now there are a number of cases in which this principle has been applied, but they all appear to be cases where the obligation to contribute is a legal obligation in the sense of a debt.

In *In re Rhodesia Goldfields*, (11), one of the later cases on the subject, in which Swinfen Eady J. dealt with the authorities fully, a trust fund was being distributed by the Court, and a trustee beneficiary against whom proceedings were pending for

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(2) 4 My. & Cr. 442.

(7) [1904] 2 Ch. 66.

(3) (1879) 13 Ch. D. 232.

(8) [1908] 2 Ch. 69.

(4) (1884) 25 Ch. D. 587.

(9) [1909] 1 Ch. 806.

(5) [1891] 3 Ch. 212.

(10) [1910] 1 Ch. 239.

(6) [1904] 1 Ch. 627; [1904] 2

(11) [1910] 1 Ch. 246.

ASTBURY J. moneys alleged to belong to the fund was held not entitled to  
 1915 take any share until the amount (if any) due from him had been  
 SMELTING ascertained and made good. The person in question was alleged  
 CORPORATION, to be largely indebted to the company in a claim which Swinfen  
*In re.* Eady J. held was a claim in debt and not in damages, and  
 SEAVER after referring to a number of authorities the learned judge  
*v.* said: "Various cases on the subject of set-off were referred to  
 THE in order to show that an unliquidated demand cannot be set off  
 COMPANY, against a liquidated debt, or a debt not due against one that is  
 — due; but this rule is of much wider application than the doctrine  
 of set-off. In my judgment the rule is of general application  
 that where an estate is being administered by the Court, or where  
 a fund is being distributed, a party cannot take anything out of  
 the fund until he has made good what he owes to the fund."

Now the question here is whether the expression "what he owes to the fund" ought to be construed as necessitating a legal obligation or whether it also applies to such a case as this, where prior to the Companies Act, 1907, applicants for debenture stock undertook in their applications to pay up the balance of their stock on allotment and on call and failed to do so.

It is clear from *South African Territories v. Wallington* (1) that prior to the Companies Act, 1907, specific performance could not be granted in respect of a contract to lend a company money payable by instalments upon the security of debentures, and that the moneys due for unpaid instalments do not constitute a debt to the company, but the company is only entitled to damages for actual loss caused by the breach of the contract.

In the present case no action for damages was ever brought against the stockholders who did not pay up in full. The result is that they lent to the company varying sums of money, and the question is whether in respect of those loans they are not entitled to be paid rateably with those who lent the full amount.

Now a number of authorities have been cited exemplifying the rule in *Cherry v. Boulton*. (2) In *In re Akerman* (3) Kekewich J. held that a statute-barred debt could be taken into account in respect of a share of residue, but in *In re Abrahams* (4)

(1) [1898] A. C. 309.

(2) 4 My. & Cr. 442.

(3) [1891] 3 Ch. 212.

(4) [1908] 2 Ch. 69.

Warrington J. held that the rule only applied to a legal debt presently payable, so that where at the death of a testator a debt was owing to him by a person to whom a share of residue was immediately given by the will and the debt was payable only by instalments the executors were not entitled to set up this equity as against the debtor in respect of unpaid future instalments.

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Under the trust deed the trustees are to hold the moneys to arise from the sale of the trust premises and after paying costs and expenses are to apply the residue first in payment of all arrears of interest to the stockholders *pari passu* in proportion to the amounts due to them respectively, and, secondly, in payment to the stockholders *pari passu* in proportion to the stock held by them respectively and without any preference or priority of issue or otherwise howsoever of all the principal moneys and premiums owing in respect of the stock held by them.

In my judgment the rule in *Cherry v. Boulton* (1) does not apply in this case, and that being so, the matter, I think, must be dealt with on the footing that various loans have been made to this company in differing amounts and that the distribution of money by the trustees under this deed ought to be among the whole of these holders rateably according to the amounts that they have paid up.

Solicitors: *Thorowgood, Tabor & Hardcastle; Sweepstone, Stone, Barber & Ellis.*

(1) 4 My. & Cr. 442.

G. R. A.



NEVILLE J. *In re* "SLOGGER" AUTOMATIC FEEDER COMPANY,  
LIMITED.

1914

Dec. 18.

HOARE *v.* THE COMPANY.

[1914 S. 3726.]

*Company—Debentures—Power for Majority of registered Debenture-holders to appoint a Receiver—Fiduciary Power—Equitable Mortgagees by Deposit of Debentures—Appointment of Receiver by Nominal Majority—Jurisdiction of Court.*

A company made a debenture issue without a trust deed. The conditions indorsed on each debenture provided (inter alia) that the company should recognize only the registered holder for the time being of the debenture, and that the registered holder might with the written consent of the majority of the debenture-holders appoint a receiver of the property charged by the debenture. In January, 1914, the debentures matured and remained unpaid. At this date the registered holders of the debentures were four parties, three of whom were shareholders of the company. The fourth party were the bankers of the company who, as registered holders of debentures and also as equitable mortgagees by deposit of some of the debentures of one of the other parties, held the majority of the debentures as security for the company's overdraft, and threatened proceedings. The other three parties who formed the majority of the registered debenture-holders thereupon, without notice to the bankers, in exercise of the power in the debentures appointed a receiver. On the application of the bankers:—

*Held* that, notwithstanding the bargain between the debenture-holders, the Court had jurisdiction on the evidence to appoint a receiver, its own officer, to realize the security under the control of the Court.

#### MOTION.

The defendant company, which was a private company, was incorporated under the Companies (Consolidation) Act, 1908, on January 3, 1911, with a nominal capital of 50,000*l.* divided into 50,000 shares of 1*l.* each. Its principal object was the acquisition of certain letters patent for a feeder for printing presses and the manufacture and sale of such feeders. The articles of association empowered the directors to raise or secure the payment of money in such manner as they might think fit, including the issue of debentures charged upon all or any part of the undertaking and assets of the company. Immediately

after its incorporation the defendant company entered into an agreement with a Mr. Jones for the purchase of the letters patent and other property for 52,230*l.*, to be satisfied as to 45,000*l.* by the issue to the vendor or his nominees of 45,000 fully-paid shares of the defendant company of 1*l.* each, as to 500*l.* in cash, and as to 6730*l.* either in cash or in first mortgage debentures forming part of an issue of 20,000*l.* Shortly afterwards 14,000 of these vendor's shares were acquired by a Mr. Likely, 8500 by a Mr. Tinling, and 5500 by a Mr. Caton. Mr. Likely was one of the directors of the company.

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 FEEDER  
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On January 16, 1911, the directors of the defendant company, under the powers conferred on them by the articles of association, made a debenture issue of 20,000*l.* in 200 first mortgage debentures of 100*l.* each. There was no trust deed. By each debenture the defendant company covenanted to pay to the registered holder the sum of 100*l.* on January 5, 1914, or such earlier date as therein mentioned, and to pay interest thereon at the rate of 5*l.* per cent. per annum as therein mentioned, and charged with such payments its undertaking and all its property and assets. The conditions indorsed on each debenture provided (amongst other things) as follows:—

1. That the debenture was one of a series of 200 first mortgage debentures issued or about to be issued by the defendant company ranking *pari passu* and as a first charge on the property thereby charged, and that such charge was to be a floating security, but so that the defendant company was not to be at liberty to create any mortgage or charge on any part of its property ranking equally with or in priority to the debentures.

3. That the registered holder for the time being of the debenture or his legal personal representative should alone be recognized by the defendant company as exclusively entitled thereto, and that free from all equities between the defendant company and the original or any immediate holder thereof, and that the defendant company should not be bound to recognize any equity or any right of any other person except as by some Court of competent jurisdiction ordered; and that the principal moneys and interest thereby secured would

NEVILLE J. be paid by the defendant company only in accordance with the now stating condition.

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14. That the registered holder for the time being of the debenture might, with the consent in writing of the holders of the majority in value of the debentures, appoint by writing any person to be a receiver of the property charged by the debentures, and that such appointment might be made at any time after the principal moneys thereby secured should have become payable and should be as effective as if all the holders of the debentures had concurred in such appointment, and that a receiver so appointed should have power :—

“(a) To take possession of, collect and get in the property charged by the debentures and for that purpose to take proceedings in the name of the company or otherwise as may seem expedient.

“(b) To carry on and concur in carrying on the business of the company and for that purpose to raise money on the property charged by the debentures in priority to the debentures.

“(c) To sell or concur in selling any of the property charged by the debentures.

“(d) To make any arrangement or compromise which he may think expedient in the interests of the holders of the debentures. And all moneys received by such receiver shall, after providing for the matters specified in the first three paragraphs of clause 8 of section 24 of the Conveyancing Act, 1881, and for the purposes aforesaid, be applied in or towards satisfaction *pari passu* of the said debentures, and the foregoing provisions shall take effect as and by way of variation and extension of the provisions of sections 19 to 24 of the said Act, which provisions so varied and extended shall be regarded as incorporated herein.”

This debenture issue was duly registered with the Registrar of Joint Stock Companies, and in January, 1911, sixty of the debentures were issued by the defendant company to their bankers, Messrs. Hoare & Co., as security for 3000*l.* then advanced by that firm to the defendant company, and were registered in the names of H. Hoare and A. Hoare, two of the partners in that firm. Sixty-five of the debentures were issued to and registered in the name

of Mr. Likely, fifty-five were issued to and registered in the name of Mr. Caton, and the remaining twenty were issued to and registered in the name of Mr. Tinling.

In September, 1912, the defendant company applied to and obtained from Messrs. Hoare & Co. a further advance of 1000*l.* on the security of their sixty debentures and of twenty of Mr. Likely's debentures deposited with them by him for that purpose. Subsequently Mr. Likely deposited another forty-four of his debentures with Hoare & Co., partly as collateral security for the 4000*l.* due to them by the company and partly as security for his own overdrawn account with them.

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The debentures matured on January 5, 1914, but remained unpaid, and in the following June Messrs. Hoare & Co. wrote the defendant company requiring payment of the principal and interest due to them. Considerable correspondence then ensued between the solicitors of Messrs. Hoare & Co. and the solicitors of the defendant company with no definite result, and ultimately Messrs. Hoare & Co.'s solicitors wrote on November 28 intimating that steps would be taken by Messrs. Hoare & Co. to recover from the defendant company the amount owing by them.

On December 3, 1914, Mr. Caton (as the registered holder of fifty-five of the debentures) with the written consent of Mr. Likely (as the registered holder of sixty-five of the debentures) and of Mr. Tinling (as the registered holder of twenty of the debentures) in writing appointed a Mr. Hayward, a chartered accountant, "to be a receiver of the property charged by the debentures of the said series to the intent that such appointment may be as effective as if all the holders of debentures of the same series had concurred therein," and so that Mr. Hayward should have the powers set forth in clauses (a), (b), (c) and (d) of the 14th condition indorsed on the debentures, and Mr. Caton thereby directed that all moneys received by such receiver were to be dealt with in the manner provided in the said debentures. The same day Mr. Likely, who had concurred in the appointment of Mr. Hayward without asking for or obtaining the consent of Messrs. Hoare & Co. to such appointment or giving them any intimation of his intention to give such concurrence, wrote that firm informing them of Mr. Hayward's appointment.



NEVILLE J. The next day, December 4, H. and A. Hoare, on behalf of  
1914 themselves and all other holders of first mortgage debentures of  
"SLOGGER" the defendant company, and Hoare & Co., issued their writ  
AUTOMATIC against the defendant company claiming a declaration that the  
FREDER first mortgage debentures constituted a first charge on the under-  
COMPANY, taking and all the property and assets of the defendant company,  
LIMITED, foreclosure or sale, the appointment of a receiver and manager,  
*In re.* and consequential relief; and now moved for the appointment  
HOARE of a receiver and manager.  
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It appeared that the principal asset of the defendant company consisted of 12,400*l.* out of a total issue of 13,000*l.* debentures of a company called the New Girling Commercial Cars, Limited, which was formed in June, 1913, and of which Mr. Tinling was one of the directors and held the remaining 600*l.* of the debentures, and that Mr. Likely held 1500 shares and Mr. Hayward 450 in the same company. Messrs. Hoare & Co. were also creditors of the same company for upwards of 800*l.* There was litigation pending between the defendant company and the New Girling Commercial Cars, Limited, and a receiver of the assets of the latter company had recently been appointed by the defendant company.

The evidence on behalf of the plaintiffs was to the effect that the value of the assets of the defendant company was very doubtful, that it was very questionable whether the 124 debentures held by Hoare & Co. would realize sufficient to repay them in full the amounts due to them, and that they were not disposed to accept the appointment of Mr. Hayward as receiver, and still less the uncontrolled exercise by him of the very wide powers which the appointment purported to confer on him. On the other hand Mr. Likely in his affidavit denied that the assets of the defendant company were of doubtful value and alleged that the New Girling Commercial Cars, Limited, owned substantial assets including freehold property, and stated that Mr. Caton in appointing the receiver was of opinion that the security of the debenture-holders was in jeopardy by reason chiefly of the financial embarrassment of the defendant company owing to the war and the threatened proceedings by the plaintiffs, and that the appointment was made in the best interests of all the debenture-holders, and he asserted

that not only was he entitled but that it was also his duty to NEVILLE J. concur in the appointment because he believed it was the best thing that could be done to protect the security of all the debenture-holders.

At the hearing of the motion it was agreed by consent that Mr. Caton should be added as a defendant to the writ and motion, and that he should be represented by the same solicitors as the company.

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*Peterson, K.C.*, and *J. K. Young*, for the plaintiffs. The plaintiffs hold either legally or equitably 124 of the 200 debentures and contend that Mr. Hayward was not properly appointed receiver. The appointment could only be made with the concurrence of Mr. Likely, and he had no right to do anything against the interests of his mortgagees, who really constituted the majority of the debenture-holders. There is no personal objection to Mr. Hayward, but having regard to the acts of Mr. Likely and to the fact that he and Mr. Tinling are either shareholders or debenture-holders of the New Girling Commercial Cars Company, that Mr. Hayward is also a shareholder of that company, and that disputes are pending between the two companies, it is contended that it is essential in the interests of the debenture-holders of the defendant company that an independent receiver should be appointed by the Court to act under the control of the Court. There is very little authority on the point. The nearest case to this is *In re Maskelyne British Typewriter* (1), where the debentures contained a somewhat similar power and the Court on the evidence appointed a receiver instead of the receiver appointed by a debenture-holder.

*Jenkins, K.C.*, and *Owen Thompson*, for the defendant company and Mr. Caton. This is a matter of contract, and the question is whether Mr. Caton properly appointed Mr. Hayward receiver. The Court will not interfere with the contractual rights of the parties—*In re Henry Pound, Son & Hutchins* (2)—unless there has been some impropriety, and there has been none here. The contract is contained in the debentures. As between the company and the debenture-holders the company was bound to accept the

(1) [1898] 1 Ch. 133.

(2) (1889) 42 Ch. D. 402.

NEVILLE J. appointment made by Mr. Caton. As between the debenture-holders the bargain was that the majority of the registered debenture-holders could appoint a receiver, and the bank took their debentures with knowledge of that power. There is no proof of any breach of good faith on the part of Caton. Likely did not cease to be the registered holder of his debentures because he created an equitable charge on them, and there is no evidence that Caton was aware of the equitable charge, or that the bank had asked Likely to transfer his debentures to them. The existence of the equitable charge did not invalidate Hayward's appointment, and there is no ground for suggesting that he will not exercise his powers for the general benefit of all the debenture-holders.

*Peterson, K.C.*, in reply. The inference is that the appointment was made to prevent the plaintiffs from taking proceedings for the appointment of a receiver.

NEVILLE J. In this case there is a difficulty because by the terms of the debentures the debenture-holders have agreed between themselves that any one of them, with the consent of a majority, shall have power to appoint a receiver with the widest possible powers to sell the property and distribute the assets. Where such a power exists the question arises whether it precludes an action for realization of the security by one or more of the debenture-holders. There has been no decision to that effect and, if I had to decide upon the question finally, my present view is that I should not so decide. If in a debenture-holder's action the Court is to undertake the realization of the security and of the property comprised in the security, a position of difficulty arises if somebody who is under no direct control of the Court, certainly not an officer of the Court, is to do the practical part of the business while the Court watches. It seems to me that at all events by the time you come to the judgment the matter must be taken out of the hands of the debenture-holders and their agent and must be undertaken by the Court itself. The question is what in the present case ought to be done on an interlocutory application. There has been a technical observance of the conditions under which a receiver with wide powers has been appointed, but when you come to examine

the constitution of the majority who gave their consent, you find that with regard to sixty-four of the debentures the consent was given by a person who had parted with all his immediate beneficial interest in the property by depositing them as security for a debt to the bank. I think that if the bank had been aware of what was intended and had previously launched a motion to restrain him from giving his consent, he would have been restrained. The question now is, having regard to the majority obtained in that way, and to the evidence which discloses a state of facts which, to say the least of it, is consistent with the action of Mr. Caton and Mr. Likely not being on behalf of the debenture-holders but on behalf of other interests, whether the Court ought to stand by or ought to take the matter into its own hands. In my opinion under the circumstances of the present case I think I ought to appoint a receiver notwithstanding the terms of the debentures, and there will be the usual reference to chambers for that purpose.

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Solicitors: *Thicknesse & Hull; Lawrence Jones & Co.*

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ASTBURY J. *In re* FLEETWOOD AND DISTRICT ELECTRIC LIGHT  
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[00431 of 1914.]

*Company—Voluntary Winding-up—Surplus Assets—Distribution—Statute-barred Creditors—Liquidator willing to pay—Opposition by Shareholders—Summons by Liquidator—Order to apply “in a due course of administration”—Subsequent Payment to Statute-barred Creditors—Propriety of Payment—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 186.*

A voluntary liquidator having surplus assets available for distribution issued a summons to determine (*inter alia*) whether he was at liberty to pay statute-barred creditors thereout.

At the hearing of the summons the statute-barred creditors contended that he was, and the shareholders that he was not, at liberty to do so.

The Court declined to answer the question specifically but directed the liquidator to apply the assets “in a due course of administration.”

The liquidator having subsequently paid certain statute-barred creditors, the shareholders issued another summons to determine whether it was a proper payment:—

*Held*, that, having regard to the shareholders’ objection formally taken on the first summons, and to the order made thereon, the payment to the statute-barred creditors was improper.

*Ex parte Dewdney* (1809) 15 Ves. 479, 498; *Shewen v. Vanderhorst* (1831) 1 Russ. & My. 347; 2 Russ. & My. 75; *Phillips v. Beal* (1862) 32 Beav. 26; and *In re Wenham* [1892] 3 Ch. 59 applied.

Whether apart from these circumstances the voluntary liquidator would have been justified in paying statute-barred creditors under the Companies (Consolidation) Act, 1908, s. 186, *quaere*.

*In re General Rolling Stock Co.* (1872) L. R. 7 Ch. 646 and *Mitchell’s Claim* (1871) L. R. 6 Ch. 822 discussed.

#### ORIGINATING SUMMONS.

The above company was incorporated in 1896 with a capital of 22,000*l.* divided into 20,005 ordinary and 1995 deferred shares of 1*l.* each, of which 19,670 ordinary and 1985 deferred shares were issued and (except thirteen ordinary shares) fully paid.

The company was not successful and in 1912 it was wound up by voluntary resolutions passed and confirmed on September 30 and October 15, 1912, and a liquidator was appointed.

In June, 1914, after paying all claims that were neither disputed nor statute-barred, the liquidator had a balance of 850*l.* in his hands, subject to the costs of the liquidation.

There was then one creditor for 500*l.* whose claim was disputed, and there were statute-barred creditors with claims amounting to 980*l.*

On June 16, 1914, the liquidator issued a summons to determine the amount payable in respect of the disputed claim and to determine whether he was at liberty to pay the statute-barred creditors.

On July 7, 1914, the case was fully argued on both points. The liquidator was willing to pay the statute-barred creditors if he was entitled to do so. The statute-barred creditors contended that he was, and the shareholders that he was not, so entitled.

Astbury J. determined the amount payable in respect of the disputed debt and directed it to be paid out of the 850*l.* after payment of the costs and the liquidator's costs, charges, expenses, and remuneration. On the second point he did not think that the Court on the voluntary liquidator's application ought to affect to determine the question whether he was at liberty to distribute the assets otherwise than in a due course of administration, and he did not feel inclined to answer the question further than by saying that he ought to distribute them in that way.

The order was drawn up accordingly and directed the liquidator to make the above payments and to apply the balance "in a due course of administration."

After making the above payments and retaining a sum of 100*l.* to meet future costs, charges, expenses, and remuneration, the liquidator now had a net balance of 408*l.*, which would allow a dividend of about 8*s.* 4*d.* in the pound to the statute-barred creditors if the liquidator was at liberty to pay them "in a due course of administration."

In order to test the point the liquidator on December 5, 1914, paid 50*l.* to the defendants representing the statute-barred creditors. The claim of these defendants was 273*l.*, so that the amount paid was considerably less than their dividend.

On December 10, 1914, the plaintiff representing the shareholders issued a friendly summons to determine whether or not this payment was a proper payment, and if improper that directions for repayment should be given.

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ASTBURY J. *Owen Thompson*, for the shareholders. Sect. 186, sub-s. i., of 1915 the Companies (Consolidation) Act, 1908, provides that on a FLEETWOOD AND DISTRICT ELECTRIC LIGHT AND POWER SYNDICATE, *In re.* voluntary winding-up the company's property shall be applied in discharge of its liabilities *pari passu* and subject thereto shall be distributed among the members. The Companies (Winding-up) Rules, 1909, rr. 88 to 114, require debts to be proved both in compulsory and voluntary liquidations, and it is submitted that the word "liabilities" in s. 186 must be limited to provable debts. When they are discharged, the liquidator holds the surplus assets in trust for the shareholders, and is not entitled to be generous to statute-barred creditors at the expense of his *cestuis que trust*.

This is clearly so in the case of a compulsory liquidation: *In re General Rolling Stock Co.* (1); *Mitchell's Claim* (2); Buckley on Companies, 9th ed. p. 474. But there is no actual decision as to the powers of a voluntary liquidator in this respect. His position is, however, analogous to that of a trustee in bankruptcy. The trustee is not entitled to pay statute-barred debts. He can only pay enforceable claims, and he must hand over the surplus to the bankrupt. A company in voluntary liquidation is really in the position of a bankrupt who has filed his own petition, and the same rule must apply.

A less close analogy is the position of an executor. An executor may pay statute-barred debts prior to an administration decree, but after such a decree he is bound to plead the statute at the instance of a residuary legatee: *Ex parte Dewdney* (3); *Shewen v. Vanderhorst* (4); *Fuller v. Redman* (5); *Phillips v. Beal* (6); *In re Wenham* (7); Williams on Executors, 10th ed. p. 1439. In the present case the shareholders took the objection in the former proceeding, and the liquidator was directed to apply the assets "in a due course of administration." He cannot therefore now pay the statute-barred creditors.

*Heckscher* (vice *Fawell* serving with His Majesty's Forces), for the liquidator. In the previous proceeding the point was really

(1) L. R. 7 Ch. 646, 648.

My. 75.

(2) L. R. 6 Ch. 822.

(5) (1859) 26 Beav. 614.

(3) 15 Ves. 479, 498.

(6) 32 Beav. 26.

(4) 1 Russ. & My. 347; 2 Russ. &

(7) [1892] 3 Ch. 59.

left open. There was nothing in the nature of an administration ASTBURY J. decree, and the direction to apply the assets "in a due course of administration" merely meant "in a due course of administration in a voluntary winding-up," i.e., according to s. 186. Now the statute-barred creditors have no right of proof, but their claims may well be liabilities under s. 186, sub-s. i., and though not debts which the liquidator is bound to pay under sub-s. v., he is entitled to pay them as quasi-executor to the company, if he thinks right so to do.

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*Ashton Cross*, for the statute-barred creditors. There is no real analogy between an adjudication in bankruptcy on the debtor's petition and a voluntary winding-up. The former requires a petition alleging that the debtor is unable to pay his debts. That is an act of bankruptcy on which the Court makes a receiving order: Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 8. Nothing of the sort is required in a voluntary winding-up. That is a purely domestic matter effected by special resolution without the intervention of the Court at all. It is very frequently carried out in the case of solvent companies like the present.

A compulsory winding-up order is no doubt very like an administration decree and the liquidator cannot pay statute-barred debts. But surely a voluntary liquidator is in a different position. His duties are regulated by s. 186. There is nothing to limit the word "liabilities" to provable debts. They may quite well include statute-barred debts which though unenforceable by action are fairly and honestly due and payable: *Curwen v. Milburn* (1); *Budgett v. Budgett*. (2)

When the matter was on before, the Court might no doubt have directed the liquidator to set up the statute at the instance of the shareholders. But it merely directed him to apply the assets "in a due course of administration," i.e., under s. 186. The liquidator is therefore simply in the position of an executor before an administration decree, and the payment of the 50*l.* was justified. If the Court is of a contrary opinion the recipients will repay it without an order.

(1) (1889) 42 Ch. D. 424, 434.

(2) [1895] 1 Ch. 202, 215.



ASTBURY J. ASTBURY J. (after stating the facts). It seems a startling proposition to suggest that in a due course of administration in a voluntary winding-up the liquidator is entitled to pay statute-barred debts. I am told there is no direct decision on the point and I must therefore decide it in accordance with the decisions on analogous courses of administration.

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Sect. 186 of the Companies (Consolidation) Act, 1908, provides that the following consequences shall ensue on the voluntary winding-up of a company: (i.) The property of the company shall be applied in satisfaction of its "liabilities" *pari passu*, and, subject thereto, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company.

Rule 88 of the Companies (Winding-up) Rules, 1909, provides that in a winding-up by the Court every creditor shall prove his debt, unless the judge in any particular winding-up shall give directions that any creditors or class of creditors shall be admitted without proof, and r. 102 provides that the liquidator in any winding-up may from time to time fix a certain day, on or before which the creditors of the company are to prove their debts or claims, or to be excluded from the benefit of any distribution made before such debts are proved.

In the winding-up of an insolvent company the rules in bankruptcy prevail under s. 207. This company, however, is not insolvent unless the statute-barred debts are admitted as liabilities provable in a due course of administration.

In *In re General Rolling Stock Co.* (1) a creditor whose debt became statute-barred after the date of the compulsory winding-up order claimed to prove in the liquidation. Lord Romilly M.R. rejected the proof, but the Court of Appeal allowed it. James L.J., after referring to the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 98 (now replaced by s. 163 of the Consolidation Act), which directs the Court after making a winding-up order to cause the assets of the company to be collected and applied in discharge of its liabilities, said: "A duty and a trust are thus imposed upon the Court, to take care that the assets of the company shall

(1) L. R. 7 Ch. 646, 648, 649.

be applied in discharge of its liabilities. What liabilities? All the liabilities of the company existing at the time when the winding-up order was made which gives the right. It appears to me that it would be most unjust if any other construction were put upon the section. After a winding-up order has been made, no action is to be brought by a creditor except by the special leave of the Court, and it cannot have been the intention of the Legislature that special leave to bring an action should be given merely in order to get rid of the Statute of Limitations." Mellish L.J. said: "It appears to me to be the clear meaning of that section, that the assets should be applied in satisfaction of all the liabilities which existed at the time of the winding-up order. That being so, I think we must consider that the Legislature intended us to follow the analogy of other cases where the assets of a debtor are to be divided amongst his creditors, whether in bankruptcy or insolvency, or under a trust for creditors, or under a decree of the Court of Chancery, in an administration suit. In these cases the rule is that everybody who had a subsisting claim at the time of the adjudication, the insolvency, the creation of the trust for creditors, or the administration decree, as the case may be, is entitled to participate in the assets, and that the Statute of Limitations does not run against this claim, but, as long as assets remain unadministered he is at liberty to come in and prove his claim, not disturbing any former dividend."

In *Mitchell's Claim* (1), which was again the case of a compulsory order, the actual question was whether there had been a sufficient acknowledgment to save the statute, but it was clearly assumed both by Bacon V.-C. and the Court of Appeal that failing that acknowledgment the statute-barred debts were not payable in a due course of administration.

In Buckley on Companies, 9th ed. p. 474, in the note to s. 206, which provides for the proof of all debts and claims in every winding-up, i.e., voluntary or compulsory, the following passage appears: "The assets are to be applied in payment of liabilities subsisting at the time of the winding-up order; after the order

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 1915 *General Rolling Stock Co.* (1) But, of course, a debt barred at the  
 FLEETWOOD date of the order cannot be proved : *Mitchell's Claim.* (2)''

AND I will now turn for a moment to the decisions on the due  
 DISTRICT administration of assets in Chancery.  
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In *Ex parte Dewdney* (3), a bankruptcy case, Lord Eldon said :  
 " In the administration of assets under a creditor's bill executors  
 are not bound to plead the Statute of Limitations ; and, if they  
 do not, the creditor, filing the bill, will have a decree on behalf  
 of himself and all other creditors ; and will be paid : "—that refers  
 to the case of a statute-barred creditor being plaintiff—" but the  
 constant course in the Master's office is to take the objection  
 against other creditors ; and to exclude from the distribution  
 those, who, if legal objections are brought forward, cannot make  
 their claims effectual : a case, affording an analogy, which goes  
 directly to the point."

There is no doubt that after an administration decree an  
 executor cannot exercise any discretion at all or do any act to  
 vary the rights of the parties, e.g., by paying a statute-barred  
 debt or giving an acknowledgment : *Shewen v. Vanderhorst* (4) ;  
*Phillips v. Beal.* (5)

In *In re Wenham* (6) executors took out an originating summons  
 asking for the determination, without administration, whether the  
 first defendant was a creditor. The other defendant was the resi-  
 duary legatee. The first defendant's claim was in fact statute-  
 barred, but the executors had not set up the statute and did not  
 intend (unless so directed) to set it up ; but they desired to have  
 the claim investigated on other grounds. North J. held that  
 the parties must be treated as standing in the same position as  
 if an administration decree had been made, and that consequently  
 the residuary legatee was entitled to insist on the statute being  
 set up.

It is contended that a voluntary liquidator has the same  
 unfettered discretion as an executor before an administration

(1) L. R. 7 Ch. 646, 648.

(2) L. R. 6 Ch. 822.

(3) 15 Ves. 479, 498.

(4) 1 Russ. & My. 347 ; 2 Russ. &  
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(5) 32 Beav. 26.

(6) [1892] 3 Ch. 59.

decree. Whether or not that is so in ordinary cases, it is not so in the present case, because a similar question was raised on July 7, 1914, in a proceeding to which the liquidator, the shareholders, and the statute-barred creditors were parties, and on the shareholders opposing payment of the statute-barred creditors the Court directed the liquidator to apply the balance in his hands "in a due course of administration."

The meaning of that order is that, the shareholders having in that proceeding formally objected to the payment of the statute-barred creditors, the liquidator who was a party and heard the objection taken was directed to apply the balance "in a due course of administration," i.e., amongst those with legal claims: so that the payment of the 50*l.* in these circumstances was improper. There will be a declaration to that effect, but the recipients undertaking to return the 50*l.* there will be no order for repayment.

Solicitors; *Whale & Wates.*

G. R. A.

*In re* BULLOCK'S WILL TRUSTS.

BULLOCK *v.* BULLOCK.

[1914 B. 3690.]

SARGANT J.

1915

Jan. 21, 22;  
Feb. 9.

*Will—Perpetuity—Remoteness—Gift to Husband of Spinster for Life with Remainder to her Children.*

A testator directed the trustees of his will to pay a third of the rents and profits of his residuary real estate to his niece I. B. (who was then a spinster) for life, and after her death to pay the same to any husband with whom she might intermarry, and who should survive her, during his life, and after the death of both to sell the estate, and hold the proceeds of one-third in trust for the children of I. B. attaining twenty-one, and if the said I. B. should die without leaving a child or there should be no child of the said I. B. who should attain a vested interest then in trust for the children of S. I. B. married but died without having had issue:—

*Held*, (1.) that the original gift in favour of the children of I. B. was not void as infringing the rule against limiting land to an unborn person for life (a husband who might be unborn at the date of the creation of the limitations) with a remainder limited so as to confer an estate by

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purchase on that person's issue ; and (2.) that, even if the original gift had been void, the gift to the children of S. was good as an alternative and severable gift.

*In re Park's Settlement* [1914] 1 Ch. 595 not followed.

*In re Frost* (1889) 43 Ch. D. 246 explained.

Observations on *Whitting v. Whitting* (1908) 53 Sol. J. 100.

HENRY BULLOCK, by his will dated November 14, 1876, after giving his widow (since deceased) a life interest in his residuary real and personal estate, and after declaring trusts of his residuary personalty, directed his trustees to deal with his residuary real estate after his widow's death as follows : In trust to pay one-third of the rents and profits to his niece Eleanor Selina James during her life for her separate use without power of anticipation, and after her death upon trust to pay the said third to her husband Samuel Hubbard James during his life ; and, as to another third part of the rents and profits, in trust to pay the same to his niece Isabella Florence Bullock (afterwards Barnardo) during her life for her separate use, without power of anticipation, and after her death upon trust to pay the same to any husband with whom she might intermarry, and who might survive her, during his life. And as to the remaining third part of the said rents and profits, in trust to pay the same to his nephew Henry Samuel Tertius Bullock for his life. And from and after the decease of the survivor of these four persons and the husband (if any) of the said Isabella Florence Bullock, the testator directed his trustees to sell his residuary real estate and to stand possessed of the proceeds of sale upon the following trusts : " In trust as to one third part thereof for all the children of my said niece Eleanor Selina James, who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, in equal shares, and if there shall be but one such child, the whole to be in trust for that one child ; and in trust as to one other third thereof for all the children (if any) of my said niece Isabella Florence Bullock, who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, in equal shares, and if there shall be but one such child the whole to be in trust for that one child, but if the said Isabella Florence

Bullock shall die without leaving a child or children, or if there shall be no child of the said Isabella Florence Bullock who shall live to attain a vested interest in the said trust funds, then the said trust funds shall go remain and be in trust for all the children of my said niece Eleanor Selina James, who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, in equal shares, and if there shall be but one such child then the whole to be in trust for such one child. And in trust as to the remaining third part of the proceeds of my said residuary real estate for all the children (if any) of my said nephew Henry Samuel Tertius Bullock who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, in equal shares, and if there should be but one child the whole to be in trust for that one child."

The will also provided in certain events for giving over the one-third share of the plaintiff Henry Samuel Tertius Bullock between the children of his nieces Eleanor Selina James and Isabella Florence Bullock, or of one of them; and then contained the following declaration: "And I hereby declare that the rents profits and income of and from my real estate and of and from such part of my real estate as shall for the time being remain unsold and unconverted, including the rents and profits which shall or may be received and accumulated before the period when my real estate shall come to be sold under the trusts hereinbefore contained, shall, after payment thereof of all incidental expenses and outgoings, be paid and applied to or for the benefit of the person or persons and in the manner to whom and in which the monies produced by such sale and conversion would for the time being be payable or applicable under this my will if such sale and conversion had been actually made, and further that my trustees may let any hereditaments for the time being remaining unsold either from year to year or for any term of years at such rents and subject to such covenants as they shall think fit, and may accept surrenders of leases and tenancies, fell timbers and other trees standing on the said hereditaments, whether for sale, repairs or otherwise, and generally may manage the same in such manner as they or he shall think fit."

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SARGANT J. It was admitted on all hands that the trust for sale in the will  
 1915 was void for remoteness, but that, inasmuch as it merely  
 BULLOCK'S WILL amounted to machinery for the purpose of dealing with the  
 TRUSTS, beneficial interests in the residuary real estate, the gift stood  
*In re.* good as a gift to the various beneficiaries of the real estate as  
 BULLOCK unconverted : see *Goodier v. Edmunds*. (1)  
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BULLOCK. The testator died in the year 1878 and his widow died at some  
 date in or prior to the year 1895.

Eleanor Selina James died on April 5, 1913, and her husband, Samuel Hubbard James, died on April 20, 1914. They had four children, all of whom attained the age of twenty-one years, namely, Burton Samuel James, Mary Eleanor Mould, and Annie Selina James, and a son, William Alfred James, who died in the year 1911, but had previously, namely, in the year 1903, assigned the whole of his reversionary interest under the testator's will to Samuel Hubbard James, Mary Eleanor Mould, and Annie Selina James upon certain trusts.

The testator's niece Isabella Florence Bullock married Frederick Adolphus Barnardo. She died without having had issue on October 17, 1881. Henry Samuel Tertius Bullock had at the date of these proceedings issue who were then in existence and had attained the age of twenty-one years.

Henrietta Ann Bullock was the devisee of the devisee of the testator's heir-at-law, and represented the rights of that heir-at-law.

An originating summons was taken out by Henry Samuel Tertius Bullock and Graham Harley Mould, the present trustees of the will, against Henrietta Ann Bullock, Burton Samuel James, Mary Eleanor Mould, Annie Selina James, and Frederick Adolphus Ernest Barnardo which, as amended at the hearing, asked for the determination of the following questions : (1.) Whether according to the true construction of the will the trustees ought, thenceforth and from time to time until the decease of the last surviving life tenant under the will, to distribute among the children of Eleanor Selina James, deceased, the one-third share of rents and profits of real estate given to her for life, and/or also one third part of the proceeds of sale

of such parts of the real estate as had been or might be sold, SARGANT J. or whether there was an entire or partial intestacy until the decease of the last surviving life tenant, or how otherwise such rents, profits, and proceeds ought to be dealt with by the plaintiffs; and (2.) whether in the event which had happened of the death of the testator's niece Isabella Florence Bullock or Barnardo without having had issue the gift over in remainder of the third share originally destined for her children to the children of Eleanor Selina James was good and would take effect on the decease of the survivor of the two tenants for life still living or whether such gift over was void and the remainder undisposed of.

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*Galbraith*, for the plaintiffs, stated the facts and the questions involved.

*C. Lyttelton Chubb*, for the defendant Henrietta Ann Bullock. The original gift in favour of the children of the testator's niece Isabella Florence Bullock is void for remoteness as involving a double possibility or contingency, inasmuch as Isabella might marry a man who was not born at the date of the testator's death: *In re Park's Settlement* (1); *In re Frost* (2); *Whitting v. Whitting*. (3) If that gift is void, the subsequent limitation to the children of Eleanor Selina James is also void. [Reference was also made to *In re Nash* (4), *Whitby v. Mitchell* (5), Sanger on Wills and Intestacies, p. 13; and Challis on Real Property, 3rd ed. p. 115.]

*A. C. Nesbitt*, for the defendants Burton Samuel James, Mary Eleanor Mould, and Annie Selina James. The gift over to the children of Eleanor Selina James is good. In the first place the decision of Eve J. in *In re Park's Settlement* (1) was wrong. What Neville J. said on this point in *Whitting v. Whitting* (3) is only an obiter dictum, and *In re Frost* (2) is really in my favour. But assuming that *In re Park's Settlement* (1) was rightly decided, and the gift to Isabella's children was void, in the event that happened, of Isabella having

(1) [1914] 1 Ch. 595.

(2) 43 Ch. D. 246.

(3) 53 Sol. J. 100.

(4) [1910] 1 Ch. 1.

(5) (1889) 42 Ch. D. 494; (1890)  
44 Ch. D. 85.



SARGANT J. died without having had issue, the gift to the children of Eleanor  
 1915 Selina James may be supported as a good alternative and sever-  
 BULLOCK'S able limitation: *Monypenny v. Dering* (1); *Goring v. Howard* (2);  
 WILL *Cambridge v. Rous* (3); *Miles v. Harford* (4); Jarman on Wills,  
 TRUSTS, vol. i. 6th ed. p. 354.  
*In re.*  
 BULLOCK *C. L. Chubb* in reply.  
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*Cur. adv. vult.*

Feb. 9. SARGANT J. (after stating the facts). On the death of Samuel Hubbard James and the consequent failure of the express trusts for payment of the rents and profits of the first third of the testator's residuary real estate the question has arisen what has to be done with that third during the interval until the death of the survivor of the plaintiff Henry Samuel Tertius Bullock and the defendant Frederick Adolphus Ernest Barnardo. Is there any gift of this income to be implied from the will or is there an intestacy with regard to it, and does it accordingly belong to the defendant Henrietta Ann Bullock? [His Lordship stated the arguments on this question, and held that there was an intestacy as to the rents and profits of the third share in question as from the death of Eleanor Selina James, and continued as below:]

A second question which I have to consider is whether, in the event which has happened of the death of the testator's niece Isabella Florence Bullock or Barnardo without having had issue, the gift over in remainder of the third share originally destined for her children to the children of Eleanor Selina James is good and will take effect on the decease of the survivor of the plaintiff H. S. T. Bullock and the defendant F. A. E. Barnardo, or whether such gift is void and the remainder is undisposed of. This is, of course, a future question, but the parties absolutely interested in the property on either determination of the matter are before the Court and anxious to ascertain their rights; and I think, therefore, that I ought to decide between them. It is said on behalf of the defendant Henrietta Ann Bullock that the original gift in favour of the children of Isabella Florence Bullock is void for

(1) (1852) 2 D. M. & G. 145, 180.

(3) (1858) 25 Beav. 409.

(2) (1848) 16 Sim. 395.

(4) (1879) 12 Ch. D. 691, 703.

remoteness on the authority of the recent case of *In re Park's Settlement* (1) and that this involves the avoidance of the subsequent limitation to the children of Eleanor Selina James. It is urged in favour of the validity of the gift over that *In re Park's Settlement* (1) was wrongly decided and the original gift to the children of Isabella Florence Bullock is good; and further that, even if this is not so, the gift over is severable and good in the event which has happened.

The rule which the limitations in the case of *In re Park's Settlement* (1) and the limitations to the children of Isabella Florence Bullock in the present case are said to have infringed is what is sometimes called "the old rule against perpetuities," a rule which relates only to real estate and is (to quote the language of Kay J. in *In re Frost* (2)) the "important rule that if land is limited to an unborn person during his life, a remainder cannot be limited so as to confer an estate by purchase on that person's issue." At first sight that rule would not appear to be applicable to the facts either here or in *In re Park's Settlement* (1), since in both cases the children to take were defined as being the children of a living and named person who may be referred to as the praepositus. To this, however, it is replied that, though the praepositus was living, the surviving husband or wife of the praepositus might have been unborn at the date of the creation of the limitations, and that the children of the praepositus to take or some of them may be children by the surviving husband or wife, in which event they would in fact be children of an unborn person to whom a prior life interest had been limited. *In re Park's Settlement* (1) is obviously a decision of far-reaching application and great importance. In that case, however, Eve J. did not express any opinion of his own; but after a reference to this rule as stated in *In re Nash* (3) merely purported to follow earlier decisions, namely, *In re Frost* (2) and *Whitting v. Whitting*. (4) Of these cases *In re Nash* (3) merely supplements *Whitby v. Mitchell* (5), and decides that the rule against limiting an estate to the children of an unborn person in

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(3) [1910] 1 Ch. 1.

(2) 43 Ch. D. 246, 252.

(4) 53 Sol. J. 100.

(5) 42 Ch. D. 494.

SARGANT J. succession to a life interest to that unborn person extends to equitable limitations as well as to legal limitations; it affords no direct assistance on the particular point now in question. It is the other two cases that have to be considered.

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In *In re Frost* (1) the devise was in effect for a daughter for life, then for any husband of hers for life, and after the death of the survivor to the use (in default of appointment) of all the children of the daughter who should be living at the death of the survivor. The main ground of the decision of Kay J. that the limitation to the children was bad was that given at the end of his judgment and was that the limitation offended against the modern rule against perpetuities, since the children were not necessarily ascertainable within a life in being and twenty-one years. But in the earlier part of his judgment the learned judge expressed a view that the limitation also violated the old rule against perpetuities. Nevertheless, this part of his decision, when carefully examined in the light of later decisions, appears to be rather against than in favour of the decision in *In re Park's Settlement*. (2) Kay J. distinctly recognized that the limitations there (which are for this purpose similar to those here) did not constitute a life estate to an unborn person succeeded by an estate to the children of that person; and his subsequent disapproval of the limitation was expressly based on analogy only and because the limitation involved a double possibility similar to that involved in the limitations prevented by the strict rule. Since then, however, the theory of double possibilities as a ground for avoiding limitations has received its quietus in the case of *In re Nash*. (3) And accordingly it seems to me that this part of the decision in *In re Frost* (1) must now be regarded merely as an authority to show that limitations to a woman for life and then to any husband who may survive her for life and then to her children is not within the old rule against perpetuities as now definitely recognized and stated in *In re Nash*. (3)

The case of *Whitting v. Whitting* (4) is one in which no indication whatever is given of the arguments or the cases cited, and in

(1) 43 Ch. D. 246, 252, 253.

(2) [1914] 1 Ch. 595.

(3) [1910] 1 Ch. 1.

(4) 53 Sol. J. 100.

which the report of the judgment is very scanty, particularly as SARGANT J. regards the point now in question. The limitation there was to a person who was on the facts held to be an original settlor for life, then to any wife he might leave surviving for life, and then to his children attaining twenty-three. This last limitation was obviously bad within the modern rule against perpetuities as not being necessarily confined within a life in being and twenty-one years after. But the learned judge, in declaring it bad on this ground, is reported to have indicated a view that it was also bad as succeeding an estate for life to a parent possibly unborn at the date of the settlement and so infringing also the old rule against perpetuities. This expression of view was entirely unnecessary for the decision of the case, and cannot, I think, be regarded as a deliberate judgment based on any consideration of prior cases. It appears to be hardly, if at all, more than an obiter dictum.

Before *In re Park's Settlement* (1), therefore, such direct authority as there is seems to me rather in favour of than against such a limitation as is now in question. And from the point of view of principle also I think that the limitation should be supported. No doubt issue must be the issue of two parents. But in general, and apart from comparatively rare and unimportant limitations such as those in special tail to the issue of two persons either married or capable of marrying, issue to take under a limitation are defined and qualified as the issue of one parent only whom I call the praepositus, and the individuality of the other parent is not taken into account in any way. I have looked anxiously at the statement of the rule in question in many works of authority, including Fearne on Contingent Remainders, Lewis on Perpetuities, Williams on Real Property, Challis on Real Property, Jarman on Wills and others, without finding any trace of a suggestion that the rule ought to be read otherwise than in its natural and ordinary meaning, or has any relation to the other possible parent of the child or children in question. And it seems to me that in such cases attention should be exclusively concentrated on the particular praepositus indicated by the will or settlement, and that

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SARGANT J. to enter upon conjectures as to the possible date of birth or other circumstances of the husband or wife of the praepositus would only be to introduce doubt and confusion into what ought to be a very definite and ascertainable rule of law. For instance, in this case undue remoteness under the old rule is obviously avoided by the requirement that the ultimate takers are to be the children of a person living at the date of the will, and I can see no sufficient reason for invalidating the limitation because these children or some of them might have been incapable of taking if they had been defined in some different manner, namely, as the children of a husband of the praepositus who might have been born after the date of the will. The answer is that they were not so defined and that they take under a more direct and better title.

I may also add that limitations such as those in the present case and in *In re Park's Settlement* (1) are by no means uncommon, and so far as I am aware have never before had any doubt cast on them on the ground now in question.

The above are my main reasons for holding that the gift over of this third to the children of Eleanor Selina James is good and valid. But I am also inclined to think that this gift over is one with a double aspect and severable within such cases as *Monypenny v. Dering* (2), and that in the event which has happened of Isabella Florence Bullock having had no issue it would have been good even if the original limitation to her children had been bad for remoteness.

Solicitors for all parties: *Ball & Redfern*.

(1) [1914] 1 Ch. 595.

(2) 2 D. M. & G. 145.

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COMPANY, LIMITED.

[1914 B. 2505.]

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Dec. 17, 18.

*Company—Shareholders—General Meeting—Alteration of Articles—Special Resolution—Notice—Sufficiency—General Nature of Business—Non-disclosure—Directors' Remuneration—Action by Shareholders—Right to sue.*

The directors of the O. company were also directors of a subsidiary company in which the O. company held practically the whole of the shares. In 1907 the directors, in exercise of the voting powers of the O. company in the subsidiary company, obtained the passing of resolutions whereby the articles of association of the subsidiary company were altered so as to increase the fixed remuneration of the directors and also to give them a percentage of the net profits. In 1913 the auditors of the O. company drew attention to the fact that the receipt by the directors of remuneration in the capacity of directors of the subsidiary company ought to be sanctioned by the shareholders. An extraordinary general meeting of the shareholders of the O. company was then convened by the directors with the object of passing special resolutions ratifying what had been done by the directors in 1907, authorizing them to retain all remuneration received and to be received by them as directors of the subsidiary company under its articles as modified in 1907, and altering the articles of the O. company by allowing its directors to receive remuneration as directors of subsidiary companies without being accountable for the same, and to exercise the voting powers conferred by them in such companies as they thought fit. The notice convening the meeting was accompanied by a circular. The notice set out the proposed resolutions, but neither the notice nor the circular gave particulars as to the amount (which was very large) of the remuneration which had been received by the directors in respect of the subsidiary company. The resolutions were passed by the requisite majority and subsequently confirmed.

In an action by a shareholder, on behalf of himself and all the other shareholders of the O. company, for a declaration that the resolutions were not binding on the ground of insufficient notice of the meeting at which they were passed, and for an injunction to restrain the company and the directors from acting upon them, the plaintiff moved for an interim order. Astbury J., following *Normandy v. Ind, Coope & Co.* [1908] 1 Ch. 84, dismissed the motion on the ground that the plaintiff had no right to sue on behalf of himself and the other shareholders without joining the company as plaintiffs:—

*Held*, on appeal, that the action was maintainable by the plaintiff:

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that the notice did not give a sufficiently full and frank disclosure to the shareholders of the facts upon which they were asked to vote; and that the resolutions were invalid and not binding upon the company.

APPEAL from a decision of Astbury J.

The plaintiff was the holder of 387 ordinary shares in the defendant company, and he brought this action on behalf of himself and all other shareholders of the defendant company against the company and its directors for a declaration that certain special resolutions purporting to have been passed and confirmed at extraordinary general meetings of the company held on June 24, 1914, and July 15, 1914, respectively were not binding upon the company; an injunction to restrain the directors from acting upon the said resolutions; an account of all sums received by the directors as remuneration for acting as directors of the Telephone Company of Egypt, Limited, since the year 1913 in excess of remuneration at the rate of 800*l.* a year; a declaration that the defendant directors were jointly and severally liable to repay to the defendant company the sums found to have been received by the defendant directors on taking such account; an order for and payment of such sums to the defendant company accordingly.

The defendant company was incorporated in 1894 to take over and acquire the undertaking, property, assets, and effects of a former company of the same name which was incorporated in 1880. The capital of the defendant company was 200,000*l.* divided into 200,000 shares of 1*l.* each.

The defendant directors were also directors of certain subsidiary companies including the above-mentioned Telephone Company of Egypt, Limited (hereinafter called the Egyptian Company). The capital of the Egyptian Company consisted of 200,000*l.* divided into 36,000 preferred shares of 5*l.* each and 4000 deferred shares of 5*l.* each. Of these the defendant company held 35,530 preferred and 3915 deferred shares.

Prior to 1903 the remuneration of the directors of the Egyptian Company was 800*l.* per annum. By a special resolution of the Egyptian Company passed and confirmed at extraordinary general meetings held respectively on August 12 and August 27, 1903, the following new article was substituted for article 58 of the

articles of association of the Egyptian Company under which the remuneration of the directors was fixed at 800*l.* per annum, namely, "The remuneration of the directors shall be the sum of 2500*l.* per annum. Such remuneration shall be divisible amongst the directors as they shall determine."

By a special resolution of the Egyptian Company passed and confirmed at extraordinary general meetings of that company held respectively on August 2 and October 22, 1907, the following article was substituted for the new article 58 which was passed in 1903, namely, "The remuneration of the directors shall be the sum of 2500*l.* per annum, and in addition thereto in each year a sum equal to 20 per cent. of the balance of the net profits arising from the carrying on of the business of the company during such year remaining over, after carrying such sums to reserve or sinking fund as the directors think proper, and after payment of a dividend of 10 per cent. for such year upon the amount paid up on the issued ordinary share capital of the company. Such additional remuneration shall be divisible amongst the directors as they shall determine."

These resolutions were passed by the directors in exercise of the voting power of the defendant company as shareholders in the Egyptian Company.

It appeared that the profits of the Egyptian Company had been large, and between 1907 and 1914 the directors had taken remuneration to the extent of 44,876*l.*, leaving undrawn a further sum of 7100*l.* to which they were entitled under the articles as altered in 1907.

In auditing the accounts of the defendant company for the year 1913 the auditors in their certificate drew attention to the fact that the directors were receiving remuneration in the capacity of directors of subsidiary companies and that such remuneration should be authorized by the shareholders of the defendant company.

On June 15, 1914, the directors of the defendant company addressed to the shareholders the following circular :—

"Dear Sir (or Madam),

"It will be in your recollection that in the auditors' certificate

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attached to the report and accounts for the year 1913 a paragraph was inserted by the auditors as follows:—

“‘The directors of the company who are directors of subsidiary companies receive remuneration in the latter capacity which should be authorised by the shareholders of this company.’

“The directors were unable to submit a resolution to the shareholders at the annual general meeting, but in accordance with the promise made at that meeting the directors are now convening a meeting for the purpose of complying with the auditors’ certificate.

“The remarks of the auditors apply only to the cases of the Telephone Company of Egypt, Limited, and the China and Japan Telephone and Electric Company, Limited. All the directors of your company with the exception of Mr. Charles P. Ackers are directors of the former company, while in the case of the China and Japan Telephone and Electric Company, Limited, the directors are Mr. Henry Grewing, Mr. H. Johnstone Grewing and Mr. T. Lloyd.

“The article dealing with the directors’ remuneration in the articles of association of the Telephone Company of Egypt, Limited, is article 58, which is as follows:—

“‘The remuneration of the directors shall be the sum of 2500*l.* per annum, and in addition thereto in each year a sum equal to 20 per cent. of the balance of the net profits arising from the carrying on of the business of the company during such year remaining over, after carrying such sums to reserve or sinking fund as the directors think proper, and after payment of a dividend of 10 per cent. for such year upon the amount paid up on the issued ordinary share capital of the company. Such additional remuneration shall be divisible amongst the directors as they shall determine.’

“In the case of the China and Japan Telephone and Electric Company, Limited, which for its articles of association adopted what is now the old Table ‘H,’ the remuneration is such as is voted by the shareholders at the annual general meeting; the amount voted at the last annual general meeting being 525*l.*

“Some of the shareholders will no doubt recollect that for

many years your company was unsuccessful, but under the management of the present board its fortunes have revived, and for several years has paid substantial and increasing dividends.

“In 1907 the articles of association of your company were altered so as to increase the remuneration of the directors, and your directors, believing that it was in accordance with the wishes of the shareholders, provided at the same time for a similar alteration being made in the articles of association of the Telephone Company of Egypt, Limited. It should, however, be stated that the directors have on no occasion availed themselves of the full remuneration to which under the articles of association of the Telephone Company of Egypt, Limited, they are entitled, the amount actually received by them by way of remuneration being 1500*l.* per annum, plus 20 per cent. of the balance of net profits.

“The notice convening the extraordinary general meeting is herewith enclosed, the day fixed, the 24th June, being the earliest date for which it could be arranged.”

The notice was as follows :—

“Notice is hereby given that an extraordinary general meeting of the above-named company will be held at the Abercorn Rooms, Great Eastern Hotel, Bishopsgate, in the City of London, on Wednesday, the twenty-fourth day of June, 1914, at 12 o'clock noon, for the purpose of considering, and if thought fit passing, the subjoined resolutions.

“Should the said resolutions be passed by the requisite majority, the same will be submitted for confirmation as special resolutions to a further extraordinary general meeting to be subsequently convened.

#### “Resolutions.

“1. That the modifications of the articles of association of the Telephone Company of Egypt, Limited, relating to directors' remuneration effected in the year 1907, and the exercise by the directors of this company of the voting rights conferred by the shares of the Telephone Company of Egypt, Limited, held by this company in favour of such modifications be and the same are and is hereby approved, ratified and adopted, and that all

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—

past, present and future directors of this company who have been, are or shall hereafter be directors of the Telephone Company of Egypt, Limited, be, and they are hereby authorised to retain all remuneration received, and to be received by them as directors of that company under, and by virtue of, the articles of that company as modified in the year 1907."

[Resolution 2 related to the remuneration of the directors of the China and Japan Telephone and Electric Company, Limited, which for the purposes of this report it is not material further to mention.]

"3. That the articles of association of the company be modified by inserting therein, after the existing article 64, the following article, namely:—

"64A. A director of this company may be or become a director of any company promoted by this company or in which it may be interested as a vendor, shareholder or otherwise, and no such director shall be accountable for any remuneration or other benefits received by him as a director or member of such company. And the directors may exercise the voting power conferred by the shares in any such company held or owned by the company in such manner in all respects as they think fit (including the exercise thereof in favour of any resolution voting or providing for the payment of remuneration to the directors of such company), and any director of this company may vote in favour of the exercise of such voting rights in manner aforesaid notwithstanding that he may be a director of such other company and as such or in any other manner interested in the exercise of such voting rights in manner aforesaid."

The meeting of which notice was thus given was duly held. The chairman gave no detailed information as to the directors' remuneration in respect of the Egyptian Company, but merely stated that the directors' fees had averaged since 1881 the sum of 320*l.* per annum for each director. The resolutions were duly passed as special resolutions and were confirmed at a subsequent meeting convened for that purpose.

The plaintiff then brought this action and moved before Astbury J. for an interim injunction. In his affidavit in

support of the motion he stated that he attended the meeting of June 24, 1914, and voted against the proposed resolutions. No statement was made at the meeting by the chairman as to the amount of the sums the payment of which was proposed to be confirmed by the resolutions. Two other shareholders made objections and asked for information, one of them having previously written to the directors complaining that no full disclosure had been made, and that the real amount of the remuneration asked to be voted was so concealed and wrapped up that no one could know what it really was. The chairman did not in his reply disclose the figures, but informed the meeting that he had sufficient proxies to carry the resolutions and proceeded to put them to the meeting. The plaintiff also attended the confirmatory meeting of July 15, when he stated that he had been advised that the resolutions were irregular as the notice had not disclosed material facts, and he therefore protested against them altogether and declined to vote.

Asbury J., without expressing any opinion as to the validity or otherwise of the resolutions, dismissed the motion on the ground that, having regard to the decision of Kekewich J. in *Normandy v. Ind, Coope & Co.* (1), by which decision he thought he was bound, the plaintiff was not entitled to maintain the action on behalf of himself and the other shareholders without joining the company as plaintiffs.

The plaintiff appealed.

*The Hon. F. Russell, K.C.*, and *H. E. Wright*, for the appellant. The four individual defendants are directors of both the defendant company and the Egyptian Company. They are trustees of the voting power which the defendant company holds in respect of the Egyptian Company. They exercised that power in such a way as to increase their remuneration as directors of the Egyptian Company, and the shareholders of the defendant company were never informed of this until in 1913 the auditors of the defendant company drew attention to the fact.

The circular accompanying the notice of June 15, 1914, is

(1) [1908] 1 Ch. 84.

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misleading, and the statement of the chairman at the meeting made it worse. The notice is altogether insufficient as it does not draw the attention of the shareholders to the true position of affairs. The resolutions proposed are in the nature of a release of the directors from any claim by the shareholders that the directors should refund what they have improperly received.

Astbury J. held himself bound by *Normandy v. Ind, Coope & Co.* (1) to decide upon the principle of *Foss v. Harbottle* (2) that the plaintiff had no right to sue.

It is submitted that the notice of the extraordinary general meeting of June 24 was altogether insufficient, inasmuch as it was not a fair notice of the real business to be presented to the meeting: *Kaye v. Croydon Tramways Co.* (3); *Tiessen v. Henderson.* (4)

No doubt the Court will not interfere with the internal management of a company, and in order to redress a wrong done to a company or to recover moneys alleged to be due to the company the action should *prima facie* be brought by the company itself, yet where the persons against whom the relief is sought themselves control the majority of shares in the company and will not permit an action to be brought in the name of the company the Court will allow the complaining shareholders to sue: *Burland v. Earle.* (5) Here if the plaintiff tried to get the sanction of the shareholders to his using the name of the company he might be defeated by a bare majority. A special resolution ought to be obtained on a proper notice: *Young v. South African and Australian Exploration and Development Syndicate.* (6)

*Foss v. Harbottle* (2) is not fatal to the plaintiff's case. Wigram V.-C. there puts the case of injury to a corporation by some of its members for which there is no adequate remedy except that of a suit by individual corporators in their private characters, and says that in such a case "the claims of justice would be found superior to any difficulties arising out of

(1) [1908] 1 Ch. 84.

(2) (1843) 2 Hare, 461.

(3) [1898] 1 Ch. 358.

(4) [1899] 1 Ch. 861.

(5) [1902] A. C. 83, 93.

(6) [1896] 2 Ch. 268.

technical rules respecting the mode in which corporations are required to sue." (1)

[LORD COZENS-HARDY M.R. referred to *Menier v. Hooper's Telegraph Works*. (2)]

*Sir Charles Macnaghten, K.C., and W. Gordon Brown*, for the respondents. Astbury J. was quite right in refusing the motion: *Foss v. Harbottle*. (3) Whether the company is or is not to bring an action is for the company itself to determine. The recovery from the defendants of what is alleged to have been wrongly received by them is a matter for the company. The shareholders may well be content with what the directors have done. The proper remedy is to get an ordinary resolution of the defendant company.

If the majority wish an action to be brought and it is found that the special resolutions were improperly obtained, then they would be nullified.

[SWINFEN EADY L.J. It might be opposed by a bare majority, with the result that a bare majority might supersede the necessity for a special resolution.]

The Court will not interfere in the internal management of the company: *MacDougall v. Gardiner*. (4) The shareholders can if they like waive the question of proper notice. As to the first resolution a bare majority was sufficient and an ordinary resolution of the company is all that is required. As to the third resolution the circular sufficiently shows the object of the resolutions, and the notice was good. It is not necessary that the notice should go into particulars; it need only specify the general nature of the business, and it is sufficient if it fairly discloses the purpose for which the meeting is convened: *Kaye v. Croydon Tramways Co.* (5) The notice in *Normandy v. Ind, Coope & Co.* (6) was obviously "tricky." That is not so here. The remedy of the defendant company is to bring an action to recover from the directors what they have received under an exercise of powers which they held in a fiduciary capacity. [They also referred to *Grant v. United*

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(1) 2 Hare, 492.

(2) (1874) L. R. 9 Ch. 350.

(3) 2 Hare, 461.

(4) (1875) 1 Ch. D. 13, 24.

(5) [1898] 1 Ch. 358, 372.

(6) [1908] 1 Ch. 84.

C. A. *Kingdom Switchback Rys. Co. (1) and North-West Transportation Co. v. Beatty. (2)]*

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*The Hon. F. Russell, K.C., in reply, referred to Gramophone and Typewriter v. Stanley. (3)*

LORD COZENS-HARDY M.R. This case has been very fully argued, and I thought at one time that it was going to raise very serious questions as to *Foss v. Harbottle* (4) and that class of cases, but further consideration has satisfied me that we ought to interfere substantially as asked by the notice of motion on these grounds. Three special resolutions, or what purport to be special resolutions, have been passed by the company by the requisite majority and confirmed at a subsequent meeting, and they are now inserted in the articles of association as being, what in form they purported to be, special resolutions altering the regulations of the company, and have as much force as any other articles that are to be found in the articles of association. Speaking generally, without attempting to go into questions of figures, what circumstances brought this about? There are two companies, the Oriental Company and the Egyptian Company, each having the same board of directors, and the Egyptian Company being in fact so much controlled by the Oriental Company that they can pass any resolutions they like with regard to the Egyptian Company. The directors of the Oriental Company in respect of the large majority of shares held by the Oriental Company in the Egyptian Company have voting powers and can pass what resolutions they like. They in fact did, in 1907, pass a resolution increasing the remuneration which the directors of the Oriental Company and the directors of the Egyptian Company were entitled to by adding 20 per cent. of the net profits of the Egyptian Company—I say net profits not forgetting that there was a limitation of 10 per cent. interest to be paid first to the shareholders. These common directors have, without any authority from the Oriental Company, put a considerable portion of the profits of the Egyptian Company into their own pockets. The auditors called attention in 1913 to

(1) (1888) 40 Ch. D. 135.

(2) (1887) 12 App. Cas. 589.

(3) [1908] 2 K. B. 89, 105.

(4) 2 Hare, 461.

the fact that that required the sanction of the shareholders. The directors thereupon summoned an extraordinary general meeting, stating the three resolutions they proposed to ask the company to pass, and accompanied that notice with a circular professing to explain the object and effect of the proposed resolutions. Now the resolutions were, No. 1, ratifying, approving, and confirming all that had been done in the past with reference to the Egyptian Company and authorizing the retention by the directors of all remuneration received and to be received by them as directors of the Egyptian Company under and by virtue of the articles of that company as modified in the year 1907. I pass over the second resolution because that refers to another company which is not in question here. The third resolution, which in form is a special resolution, proposes to alter the articles of association of the company by inserting new articles of the most sweeping kind. [The Master of the Rolls read the terms of the resolution and continued:] That is a plain alteration (which I cannot help regarding as a most serious matter) of the existing constitution of the company. That was accompanied by a circular setting out the articles of the Egyptian Company which, in 1907, had the effect of giving the directors 2500*l.* per annum and 20 per cent. of the profits in addition. Then the circular refers in the next paragraph to the Japan Company which was the subject of the second resolution and which substantially stands in relation to the Oriental Company in the same position as the Egyptian Company does. In the case of the Japan Company, says the circular, the remuneration is such as is voted by the shareholders in annual general meeting, and the amount voted at the last annual general meeting was 525*l.* The directors in effect say "Think how little we got for our services in the Japan Company, only 500 guineas divided among the directors," who, I think, were three in number. Then the circular says: "Some of the shareholders will no doubt recollect that for many years your company was unsuccessful, but under the management of the present board its fortunes have revived, and for several years it has paid substantial and increasing dividends." The history of the company was not that which is there indicated. The present company is

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a comparatively modern company. The original company was started somewhere in the year 1880, it was wound up, and the new company, the present Oriental Company, was established in 1894. It had not therefore anything like the length of history which this circular, and the statement by the chairman at the meeting, indicated. Then the circular says: "In 1907 the articles of association of your company were altered so as to increase the remuneration of the directors, and your directors, believing that it was in accordance with the wish of all the shareholders, provided at the same time for a similar alteration being made in the articles of association of the Telephone Company of Egypt, Limited"—confessing quite plainly that these directors could do exactly what they liked with the Egyptian Company. "It should, however, be stated that the directors have on no occasion availed themselves of the full remuneration to which under the articles of association of the Telephone Company of Egypt, Limited, they are entitled, the amount actually received by them by way of remuneration being 1500*l.* per annum, plus 20 per cent. of the balance of net profits." It is startling to be told that in this company a sum of upwards of 40,000*l.*—I think it is 44,000*l.*—has been received by these directors in respect of the Egyptian Company, and put into their pockets; and there is no hint of that in this circular. It suggests that these directors got very small remuneration in respect of the Japan Company, and that the shareholders really ought not to object to their having more; it suggests, by mentioning that, that that is the only material figure. I do not go so far as to say that the shareholders of the Oriental Company might not honestly agree, on full information with regard to the facts, to the directors retaining in the past, and keeping in the future, this large remuneration for their services, but I am very clear in my own mind that if any attempt is to be made by the directors to get the sanction of the shareholders it must be made on a fair and reasonably full statement of the facts upon which the directors are asking the shareholders to vote. This notice coupled with the circular, and I think also with the statements made by the chairman at the meeting, seems to me to be not frank, not open, not clear, and not in any way satisfactory. That being so,

assuming that the notice is, by its suppression as well as by what it states, not satisfactory or, to use Lindley L.J.'s word, "tricky," what are the consequences? We are told that *Foss v. Harbottle* (1) shows that such an action as this can only be brought against the directors in the name of the company, and the plaintiff suing on behalf of himself and all other shareholders cannot maintain the action at all. I think there is no foundation for that. The Court of Appeal in *Kaye v. Croydon Tramways Co.* (2), which in all that is material is almost a replica of the present case, decided that in such a case the Court could say that when there was a special resolution passed by what was a "tricky" notice it could not be supported. It is quite true that *Foss v. Harbottle* (1) was not cited there.\* I am sure there is nobody in Court who would venture to say that the very distinguished counsel who argued that case had never heard of *Foss v. Harbottle* (1) and were not perfectly familiar with the principle and with the cases in which *Foss v. Harbottle* (1) has been applied. I feel no difficulty in saying that special resolutions obtained by means of a notice which did not substantially put the shareholders in the position to know what they were voting about cannot be supported, and in so far as these special resolutions were passed on the faith and footing of such a notice the defendants cannot act upon them.

It was, I think, not really disputed by counsel for the respondents so far as article 64A was concerned—that is the one which in terms alters the articles of association—the contention was this: Even if it be not a good special resolution the company alone can alter it, and they, by an ordinary resolution, can give it the same effect as if it were a good special resolution. That seems to me to be directly opposed to the Act of Parliament, which says in terms that certain things can be done by special resolution and other things cannot; and to say that the company by an ordinary resolution can indirectly do that which the Act says can only be done by a special resolution is a proposition which I am not prepared for one moment to assent to. So much for the third resolution. Then how does resolution No. 1 stand? That was a special resolution, and it cannot be altered

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(1) 2 Hare, 461.

(2) [1898] 1 Ch. 358.

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except by another special resolution. I think the considerations applicable to No. 3 apply also to No. 1. Without going further into it I think this appeal ought to be allowed, modifying the notice of motion only in this sense, that we grant an injunction restraining the directors until the trial of this action or further order from acting upon the first and third of the resolutions passed at this meeting. That will not in any way affect the directors in any other resolutions which may or may not be passed sanctioning what has been done in the past. I simply say that the directors shall not, until the trial of this action or further order, act upon the first and third resolutions.

KENNEDY L.J. I have nothing to add, and I entirely agree both with the result and with the reasons.

SWINFEN EADY L.J. I am of the same opinion.

The plaintiff is seeking to restrain the defendants from acting upon two special resolutions, the first and the third. They were passed as special resolutions. It is conceded that to effect the objects of the third a special resolution was necessary. With regard to the first it was passed as such, and unless successfully impeached will remain as a special resolution. The plaintiff claims that it was not properly passed. The defendants say first that it was properly passed, and secondly that if it was not, the plaintiff cannot complain of it in this action and the shareholders are not entitled to sue. With regard to its being properly passed the Master of the Rolls has already dealt with the material facts, pointing out if you read that notice with the accompanying circular how misleading it is.

Then it may be said that the defendants were offered full opportunity of knowledge. Mr. Baillie, the plaintiff, denies that, and on the contrary he alleges that he had no invitation to apply for information, and that the enormous sum which had been received by the directors during the last seven years in respect of the Egyptian Company had been sedulously concealed. That is his statement, and had it not been for the report of the auditors, the fact would not have been brought to his knowledge. It cannot be said in opposition to that that it was cured by what

the chairman of the directors said at the general meeting at which this was passed. If you read Mr. Ackers' statement nothing can be more disingenuous. His statement is: "I was prepared at the meeting with a detailed statement setting out the amounts received by the directors for remuneration since the year 1881 in the case of the Oriental Company and since the year 1883 in the case of the Telephone Company of Egypt, Limited, hereinafter referred to as 'the Egyptian Company.' It was not practicable to read out the whole of the details to the meeting, but in making my speech to the shareholders I gave them some of the information contained in that statement, and I explained that the total amount of remuneration received by the directors both as directors of the Oriental Company and also of the Egyptian Company since the commencement if equally divided among the board would have amounted to a sum of about 320*l.* per annum for each director." That is the statement that he made. Now it is to be observed that he goes back to the year 1881, that is before any of the present directors was a director of the company or of its predecessor. Further, 1881 had no reference to this company, that is the Oriental Company, it was a predecessor that had been wound up, and the defendant company was not formed until 1894, so that he goes back to the history of an earlier company which had liquidated, and to persons who are not now directors, in order to obtain a large figure by which to divide the total remuneration, and thus bring down the average remuneration for each director over the whole period to about 320*l.* per annum; the facts that were not stated being that, without obtaining the concurrence of the shareholders of the Oriental Company, the articles of the Egyptian Company had been altered, and that, under the altered articles of the Egyptian Company and the present articles of the Oriental Company, the amount to which the five directors were entitled between them for the two years 1912 and 1913 was 8000*l.* as a fixed sum (2500*l.* and 1500*l.*, making together 4000*l.* a year), and for their share of profits 9931*l.* for the first year and 10,328*l.* for the second; in other words, that during these two years, brushing aside the misleading average of 320*l.*, what they really were entitled to draw for these two years was 28,259*l.* Those facts speak for

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themselves. Was there a full, fair, and frank disclosure to the shareholders of what the real facts were when they stated that starting from 1881 the remuneration would work out at an average of 320*l.* per annum? Manifestly not.

It was then contended that the plaintiff is not entitled to sue. The plaintiff's counsel urged that if this as a special resolution was invalidly passed, how is it to be impeached if the plaintiff cannot sue; how can the question of illegality be raised? Suppose he called a meeting and the majority of the shareholders were to say "We are content with the present position, and we will not raise any question," can it be said that by a side wind as it were, not being able to pass a valid special resolution, they could pass an invalid one and then by a bare majority say we will not allow any proceedings to be taken? In my opinion they cannot do that. It was said there was no reference to *Foss v. Harbottle* (1) in *Kaye v. Croydon Tramways Co.* (2) But *Foss v. Harbottle* (1) also shows what the rights of the parties are in a case like the present. Wigram V.-C. says (3): "If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private character, and asking in such character the protection of those rights to which in their corporate character they were entitled, I cannot but think that the principle so forcibly laid down by Lord Cottenham in *Wallworth v. Holt* (4), and other cases, would apply, and the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue." In other words it has been said that in certain cases members may sue on behalf of the corporation if the interests of justice require it. In *Mozley v. Alston* (5), which came before Lord Cottenham shortly after *Foss v. Harbottle* (1), there was no equity in the bill; it was a purely legal question. The Lord Chancellor said on that ground alone it would have been sufficient to decide against the plaintiff, and to deter him from assuming a jurisdiction to decide the point of law at a time when the Court

(1) 2 Hare, 461.

(3) 2 Hare, 492.

(2) [1898] 1 Ch. 358.

(4) (1841) 4 My. &amp; Cr. 619, 635.

(5) (1847) 1 Ph. 790.

of Chancery only dealt with equity matters. He also stated that the rule which requires all persons interested to be parties had been relaxed to meet the exigencies of modern times, it being found that too strict an adherence to it would operate in many cases as a denial of justice, and leave parties who had a real grievance without a remedy. In the case then before the Court, however, the bill alleged that a large majority of shareholders supported the plaintiff; the company could therefore file a bill in its corporate character to remedy the evil complained of, and "to allow, under such circumstances, a bill to be filed by some shareholders on behalf of themselves and others, would be to admit a form of pleading which was originally introduced on the ground of necessity alone, to a case in which it is obvious that no such necessity exists." It seems to me that that case also is an authority for saying that in such a case as the present the form of action is correct. In my opinion the plaintiff is entitled to maintain this action and to the relief which the Master of the Rolls has mentioned.

Solicitors: *Ashurst, Morris, Crisp & Co.; Linklater, Addison & Brown.*

G. A. S.

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*In re* A COMPANY. (1)

[0022 of 1915.]

*In re* A COMPANY.

[0023 of 1915.]

*Company — Winding-up Petition — Leave to present — Judgment Creditor — Equitable Execution — “Proceed to the enforcement of any judgment” — Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 78), s. 1, sub-s. 1 (a).*

By the Courts (Emergency Powers) Act, 1914, s. 1, sub-s. 1, “From and after the passing of this Act no person shall—(a) proceed to execution on, or otherwise to the enforcement of, any judgment or order of any Court . . . for the payment or recovery of a sum of money . . . except after such application to such Court and such notice as may be provided by rules or directions under this Act” :—

*Held* (reversing the decision of Astbury J.), that a winding-up petition was neither a proceeding to execution nor a proceeding to the enforcement of a judgment within the meaning of this sub-section.

APPEAL from two decisions of Astbury J.

On July 16, 1914, the petitioner commenced an action in the King’s Bench Division against the above companies, who were respectively the proprietors and printers of a weekly newspaper, for damages for libel.

On January 12, 1915, the action came on for trial before the Lord Chief Justice and a special jury, and the jury found in favour of the petitioner and awarded her a sum of 1200*l*.

On January 13 and 14 the petitioner’s solicitors applied for payment of the 1200*l*.

On January 20 the petitioner, without making any attempt to issue execution or to obtain the leave of the Court to proceed under the Courts (Emergency Powers) Act, 1914, presented petitions for the winding up of both companies.

On January 22 each of the companies moved for an injunction to restrain the petitioner from advertising or proceeding with her petition or otherwise proceeding to the enforcement of the judgment unless and until application should have been made to

(1) *Sic* in the Cause List.

the Court under the provisions of the Courts (Emergency Powers) Act, 1914, and the Court should have granted leave to proceed for the enforcement of the judgment.

The motion in each case was founded on s. 1, sub-s. 1 (a), of the Act. (1)

Astbury J. held that a petition by a judgment creditor to wind up a company was a proceeding to execution on, or otherwise to the enforcement of, the judgment in respect of which it was presented within the meaning of s. 1, sub-s. 1 (a), of the Act, and granted the injunctions asked.

The petitioner appealed.

*Jenkins, K.C.*, and *B. A. Hall*, for the appellant. The only question in this case is whether it is necessary that a judgment creditor who has recovered judgment against a company should before presenting a petition to wind it up obtain the leave of the Court under the Courts (Emergency Powers) Act, 1914. The question turns on whether a winding-up petition is a proceeding "to execution on, or otherwise to the enforcement of," a judgment within s. 1, sub-s. 1 (a), of the Act, and it is submitted that it is not. This contention is supported by sub-s. 3 of the same section, which shows that the presentation of a bankruptcy petition by a judgment creditor is not such a proceeding.

[*PHILLIMORE L.J.* referred to *In re Silber*. (2)]

(1) Courts (Emergency Powers) Act, 1914, s. 1, sub-s. 1: "From and after the passing of this Act no person shall—

(a) proceed to execution on, or otherwise to the enforcement of, any judgment or order of any Court (whether entered or made before or after the passing of this Act) for the payment or recovery of a sum of money to which this subsection applies, except after such application to such Court and such notice as may be provided for by rules or directions under this Act; . . . ."

Sub-s. 3: "Where a bankruptcy petition has been presented against any debtor, and the debtor proves to the satisfaction of the Court having jurisdiction in bankruptcy that his inability to pay his debts is due to circumstances attributable, directly or indirectly, to the present war, the Court may, in its absolute discretion, after considering all the circumstances of the case and the position of all the parties, at any time stay the proceedings under the petition for such time and subject to such conditions as the Court thinks fit."

(2) [1915] W. N. 71.

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*In re.*



C. A.      If the presentation of a bankruptcy petition which presents  
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 A COMPANY, execution or otherwise to enforce a judgment it is difficult to see  
In re.      how the presentation of a winding-up petition can be such a  
                  proceeding. It is submitted that a winding-up petition is not  
                  within the Act at all: *In re World of Golf*. (1) It may be that  
                  the Legislature was satisfied not to interfere in the case of a  
                  winding-up petition. Astbury J. has treated the Act as if it  
                  applied to any step taken by a judgment creditor which is likely  
                  to bring about payment of his debt, but this is not so. The  
                  draftsman of the Act had in his mind rr. 3 and 24 of Order XLII.  
                  A judgment creditor in presenting a winding-up petition is not  
                  levying an execution within r. 24. The words "or otherwise to  
                  the enforcement of" a judgment in sub-s. 1 (a) point to the  
                  obtaining by the judgment creditor of "equitable execution" by  
                  the appointment of a receiver, which, as was pointed out by  
                  Buckley L.J. in *Morgan v. Hart* (2), is not execution at all, but  
                  a substitute for it. Astbury J. was, it is submitted, misled by  
                  certain observations of the judges in *In re Chapel House Colliery*  
                  *Co.* (3) and *In re Crigglestone Coal Co.* (4) to the effect that a  
                  winding-up order gave an unpaid creditor a right to equitable  
                  execution. In neither of those cases were the creditors judg-  
                  ment creditors. In the latter case Buckley J. said (5):  
                  "This right" (i.e., to a winding-up order) "of the unpaid  
                  creditor may be called, as Lord Bowen called it in *In re Chapel*  
                  *House Colliery Co.* (3), a right to equitable execution. A creditor  
                  who obtains a judgment, and issues execution at law, has a legal  
                  right to the means of satisfying his judgment." The point,  
                  however, which the Court was there considering was whether  
                  the Court would make a winding-up order where it was not  
                  shown that the company had any assets. That question is now  
                  settled by s. 141, sub-s. 1, of the Companies (Consolidation) Act,  
                  1908, which provides that the Court shall not refuse to make a  
                  winding-up order on the ground only that the company has no  
                  assets. [They also referred to *In re Oriental Inland Steam Co.* (6)]

(1) (1914) 59 Sol. J. 7.

(2) [1914] 2 K. B. 183, 187.

(3) (1883) 24 Ch. D. 259.

(4) [1906] 2 Ch. 327.

(5) [1906] 2 Ch. 331.

(6) (1874) L. R. 9 Ch. 557, 559.

*Hon. Frank Russell, K.C., and Percy Wheeler*, for the first respondent company. The question here is whether the petitioner by presenting a winding-up petition is not proceeding to enforce her judgment. A judgment creditor who presents a winding-up petition does so obviously for the purpose of enforcing the payment of his debt.

It is said that there is a special provision in sub-s. 3 of s. 1 of the Act which shows that a winding-up petition is not within sub-s. 1 of that section. But a bankruptcy petition in the case of an individual does not correspond to a winding-up petition in the case of a company. On a bankruptcy petition a receiving order only is made: Bankruptcy Act, 1883, s. 9. The petitioner has to take a further step in order to obtain an adjudication (s. 20). It is the second and not the first step which is a proceeding to the enforcement of the judgment. The presentation of the petition is not such a proceeding.

[PHILLMORE L.J. It is only that the way is longer.]

Further a bankruptcy petition is not advertised, whereas a winding-up petition is.

That a winding-up order is a means of enabling a creditor to obtain payment of his debt is shown by numerous cases. In *In re St. Thomas' Dock Co.* (1) Jessel M.R. said: "The object of a creditors' petition to wind up is to get paid; a creditors' petition ought to be presented with no other object." In *In re General Co. for the Promotion of Land Credit* (2) Giffard L.J., referring to the making of a winding-up order, said: "It is neither more nor less than the mode of execution which this Court gives to a creditor against a company unable to pay its debts." Again in *In re Chapel House Colliery Co.* (3) Cotton L.J. describes a winding-up order as "the means of having the assets of a company applied in payment of its debts." In *In re Combined Weighing and Advertising Machine Co.* (4) Bowen L.J. said: "We must remember that these winding-up sections cannot be extended lightly or loosely, because they are procedure in the nature of execution against the company, and involve important results

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(1) (1876) 2 Ch. D. 116, 118.

(3) 24 Ch. D. 259, 268.

(2) (1870) L. R. 5 Ch. 363, 380.

(4) (1889) 43 Ch. D. 99, 105.

C. A. against property." In *In re Crigglestone Coal Co.* (1)  
 1915 Collins M.R. said that "prima facie the right of a creditor who  
 A COMPANY, cannot obtain payment of his debt to obtain a winding-up order  
*In re.* is ex debito justitiae." These are strong phrases all pointing in  
 one direction, namely, to show that the only object and effect of  
 a winding-up order are that the assets of the company may be  
 seized by the liquidator and applied in payment of its debts.  
 The presentation therefore of a winding-up petition by a judg-  
 ment creditor is, it is submitted, a proceeding "to execution on  
 or otherwise to enforce" his judgment. The judgment of the  
 Court below was right.

*Gore-Browne, K.C., H. M. Giveen, and A. F. Topham*, for the  
 second respondent company. We adopt the same argument.  
 In construing an emergency statute one is entitled to look at the  
 title. The Act in question is intituled "An Act to give, in con-  
 nexion with the present war, further powers to Courts in relation to  
 the remedies for the recovery of money, and in relation to other  
 similar matters." The question whether but for the war a  
 company would be able to pay its debts is a matter which ought  
 to be brought to the notice of the Court.

[LORD COZENS-HARDY M.R. referred to s. 141 of the Companies  
 (Consolidation) Act, 1908.]

The Act of 1914 ought to be given a full and generous inter-  
 pretation in favour of the debtor. The words "proceed . . . .  
 to the enforcement of any judgment or order" are not words of  
 art. Their object is to include every mode of procedure by  
 which a judgment or order may be enforced.

[LORD COZENS-HARDY M.R. referred to *In re Farnol Eades  
 Irvine & Co.* (2)]

The Act does not deprive a creditor of his remedy: it merely  
 enables the Court to postpone the enforcement of it.

*Jenkins, K.C.*, in reply.

LORD COZENS-HARDY M.R. We think that these appeals should  
 be allowed, but having regard to the importance of the question  
 raised by them we will give our reasons in a few days. The  
 injunctions granted by Astbury J. will be dissolved.

(1) [1906] 2 Ch. 327, 337.

(2) Ante, p. 22.

Feb. 16. LORD COZENS-HARDY M.R. read the following judgment:—This appeal from an order of Astbury J. restraining the petitioner from advertising or proceeding with a winding-up petition unless and until application shall have been made to the Court under the provisions of the Courts (Emergency Powers) Act, 1914, and the Court shall have granted leave to proceed for the enforcement of the judgment raises an important question under the above Act. The petitioner was plaintiff in an action in the King's Bench Division for libel in which substantial damages were awarded by a special jury, and judgment was recovered against the company for the damages and costs. The petition alleges (1.) that the judgment debt is justly due and owing; (2.) that the company is insolvent and unable to pay its debts; and (3.) that it is just and equitable that the company should be wound up. The company contend that the petitioner is, within the meaning of s. 1, sub-s. 1, of the Act, proceeding to "execution on the judgment" or otherwise proceeding "to the enforcement of the judgment." Now "execution on the judgment" is a technical term. It is a legal process by which the judgment creditor, in that character and for his sole benefit, by a proceeding in the same action seeks to satisfy his judgment wholly or partially. I think it is plain that a winding-up petition is not execution on a judgment. It lacks almost every element of such an execution. The present petitioner comes under s. 130 of the Companies (Consolidation) Act, 1908, as a creditor, and none the less because she proves the debt by the production of a judgment. She comes not to the King's Bench Division but to the Chancery Division. She does not and cannot rely upon sub-s. (ii.) because no execution has been issued on the judgment; nor can she rely upon sub-s. (i.) because there has not been a failure to comply for three weeks with a demand for payment of the sum due. But she does and can rely upon sub-s. (iv.). She alleges that the company is unable to pay its debts. And she also alleges that it is just and equitable that the company should be wound up—s. 129 (v.) and (vi.).

It remains to consider the subsequent words "or otherwise to the enforcement of" the judgment. Those words seem to me to

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be designed to meet the common case in which the judgment creditor obtains a receiver when he cannot get legal execution. This is sometimes and not inconveniently spoken of as "equitable execution," though it is not execution, as has been recently, though not for the first time, pointed out by Buckley L.J. in *Morgan v. Hart*. (1) The appointment of such a receiver is obtained by the judgment creditor in that character and for his sole benefit. It is strictly analogous to a legal execution in these respects, and the words "otherwise to the enforcement" of the judgment precisely meet the case. There may be other cases, but I cannot so construe the section as to extend it to a winding-up petition which may be presented by a petitioner who is not a judgment creditor, and which does not enure for the sole benefit of the judgment creditor, but must enure for the benefit of all the creditors.

The learned judge seems to have been pressed by expressions used by various judges to the effect that a winding-up order is in effect "giving the petitioner equitable execution." Lord Bowen used these words in a case where the petitioner was not a judgment creditor. I protest against treating such phrases as though they were contained in an Act of Parliament. They were sufficient and apt for the purpose for which they were employed. The winding-up order secures that all the assets of the company shall be applied for the benefit of all the creditors, and that is all that was intended.

In my opinion the winding-up petition is neither a proceeding to execution on, nor a proceeding to the enforcement of, a judgment within the meaning of s. 1, sub-s. 1, of the Act.

A few days ago this Court decided that a bankruptcy petition is not within s. 1, sub-s. 1, but solely within s. 1, sub-s. 3: *In re Silber*. (2) I do not think it necessary to consider that decision, and I prefer to rely upon the language of s. 1, sub-s. 1, without the aid of s. 1, sub-s. 3.

The appeal must be allowed, and the order for an injunction must be discharged.

I have dealt with one only of the two cases in the paper. The other is identical, and the same order must be made.

(1) [1914] 2 K. B. 183, 188.

(2) [1915] W. N. 71.

PHILLIMORE L.J. read the following judgment:—The appellant has recovered judgment against two companies in an action for libel and without levying execution she has presented creditors' petitions for winding up the two companies.

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Each of the companies applied to the judge in winding-up matters to restrain the petitioner from publishing the usual advertisements on the ground that she had not fulfilled a condition precedent to the presentation of her petition, and the judge (Astbury J.) has made the order.

The companies rely on s. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1914, paragraph (a) of which provides that no person shall "proceed to execution on, or otherwise to the enforcement of, any judgment or order of any Court . . . for the payment or recovery of a sum of money . . . except after such application to such Court and such notice as may be provided for by rules . . . ." In this citation I have omitted words not material to this case. The rules provide that this application shall be made to the Court by which the judgment has been given.

The companies say that the petitioner, being a judgment creditor, is now by her petitions proceeding to the enforcement of her judgment and that she cannot do so till she has made application to the King's Bench Division for leave so to proceed.

Now the words "execution" and "enforcement of a judgment" are terms of art. "Execution" is I think meant for the old common law process by which the sheriff in obedience to one of the old common law writs procures for a judgment creditor the fruits of his judgment. "Enforcement of process" is used in Order XLII., rr. 3 and 24, to cover as well the modes of compelling obedience to their decrees, orders, or sentences in use in the Court of Chancery or the Court of Admiralty and now conferred, as well as the powers of issuing execution, upon the High Court of Justice. It is true that one of the processes in use in the High Court of Chancery and now in the High Court of Justice, that of appointing a receiver, is sometimes spoken of as "equitable execution." But the phrase though convenient if not misunderstood is a metaphor only, as has been pointed out more than once and quite recently in *Morgan v. Hart*. (1) In the same way

(1) [1914] 2 K. B. 183.

C. A.      Order XLII., which deals with every mode of enforcement of judgment, has for its title "Execution." There may be other forms of  
1915      enforcing judgments besides the appointment of receivers to  
A COMPANY,      which these words apply.  
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Phillimore L.J.      In some general loose sense an unsatisfied creditor may be said to be enforcing his judgment by presenting a petition for a winding-up. But, except that his judgment is evidence of his debt, a judgment creditor is in no better position for a winding-up than any other creditor. An execution creditor is.

Almost the same thing happens in bankruptcy. A bankruptcy notice under s. 1 of the Bankruptcy Act, 1914, can only be served by a creditor who has obtained a judgment on which execution has not been stayed. There is just this difference, that he need not have issued execution; but he must have been in a position to issue it.

Returning to the case of a winding-up petition, any creditor whose debt is sufficiently large can present a petition and procure an order if he satisfies the Court that the company is unable to pay its debts; and s. 130 of the Act of 1908 provides four tests of inability. The third is applicable to Scotland only. The second is "if . . . execution or other process issued on a judgment decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part." The petitioner cannot avail herself of this provision because she has not got execution, and if she had sought to get execution she might have had to get leave under the section already quoted of the Courts (Emergency Powers) Act, 1914. Neither in the particular circumstances can she avail herself of test number 1. But she can avail herself of test number 4 not as a judgment creditor but as a creditor. In the particular case she is a creditor because her damages have been liquidated by a judgment. But it would be the same if she were a simple contract creditor whose debt was merged in a judgment. She is not therefore seeking to enforce her judgment. She is proceeding to a new alternative mode of recovering her debt, a mode by which she no longer seeks to recover for herself alone but for the benefit of all the creditors, as in a creditor's suit for the administration <sup>of</sup> the estate of a deceased debtor or in a bankruptcy.

We had a question of bankruptcy before us recently in *In re Silber* (1) on February 9, when we decided that proceedings in bankruptcy were not within sub-s. 1 of s. 1. That case turned partly on dates, the material ones being before the Act, and partly on the spécial provision of sub-s. 3 which enables the Bankruptcy Court to have regard to difficulties created by the war in considering whether there should be an adjudication. It has therefore only an indirect bearing on the present case, which must be decided on broader principles.

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It is true that the statute gives no such powers in the case of a petition to wind up a company as are given in bankruptcy. Neither does it in the case of a creditors' administration action. There may be several reasons for this (some at any rate have occurred to me). But it is not necessary to discuss them. The statute is sufficient for us.

Generally speaking the statute is one to prevent individual creditors making harsh use of their legal rights whether by enforcing judgments or by acts in pais (as under paragraph b). But there is nothing in the Act to prevent individual creditors from bringing insolvent debtors whether persons or companies before the tribunal of distribution, so that, if the tribunal thinks it a proper case to proceed, the assets of the debtor may be distributed among the creditors.

These appeals therefore should be allowed, and the injunctions dissolved.

JOYCE J. I agree and do not think it necessary to add anything.

Solicitors ; *Herbert Smith, Goss, King & Gregory ; Close & Co. ; Walbrook & Hosken.*

(1) [1915] W. N. 71.

W. L. C.



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[1914 K. 281.]

*Feb. 5, 8, 9. Restraint of Trade—Master and Servant—Agreement not to solicit Customers, or to advertise that the Servant was “late with” the Master—Reasonable Restriction—Breach by Partnership Firm—Responsibility of Partner—Determination of Contract by Payment of Wages in Lieu of Notice—Wrongful Dismissal—Repudiation of Contract.*

K. and P. signed an agreement that K. should employ P. as saleswoman in his business at a fixed weekly salary, the employment to be terminable by a week's notice on either side and subject to conditions whereby P. agreed (1.) not at any time during or after the termination of the employment directly or indirectly to solicit, interfere with, or entice away from K. any customer of, or any person in the habit of dealing with, K.; and (2.) not at any time after the termination of the employment to advertise that she was “late with” or in the employment of K. K. discharged P., paying her a week's wages in lieu of notice. P. entered the employment of Ph., a former employee of K., who was carrying on in his own name a business similar to that of K., but had not entered into any covenant. It was alleged that P. was in fact in partnership with Ph. in his business.

K. brought this action against P. for an injunction restraining her from breaking her agreement. The breaches alleged were (1.) that she had personally signed and addressed to customers of K. circulars soliciting their custom for Ph.; (2.) that the firm of Ph. had used in advertisements the words “Ph. (Russian) late with K.,” in breach of clause 1 of the agreement.

The defendant took a preliminary objection that the dismissal of P. by K. on payment of wages in lieu of notice was a wrongful dismissal amounting to a repudiation of the contract by K. :—

*Held*, that there was no contract by K. to find employment for P. during the period for which she was paid wages, and, therefore, there was no wrongful dismissal or repudiation of the contract.

*General Billposting Co. v. Atkinson* [1908] 1 Ch. 537; [1909] A. C. 118, distinguished.

*Held* on the facts, that the defendant was not proved to be a partner of Ph., and the words complained of did not represent that all the partners in Ph.'s firm were late with K.

*Held*, also, that the agreement not to solicit customers could not be confined by construction to persons who were customers during the employment, but extended to all persons who were customers at the date of the agreement or at any time after that date, and was therefore wider than was reasonable, and was bad.

THIS action was brought by Solomon Konski, who carried on the business of a ladies' tailor and furrier, against Emily Peet, a

former employee, for an injunction restraining her from soliciting his customers or advertising herself as "late with Konski" in breach of her agreement. The defendant had entered the plaintiff's employment in May, 1913. No agreement was then made, but soon afterwards, in consequence of two former employees starting a business in opposition and advertising themselves as "late with Konski," Konski required all his employees, including the defendant, to enter into agreements containing the clauses set out below.

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On April 25, 1914, the defendant, who had given notice to leave and been induced to stay on, and K. signed a fresh agreement in the same form as before. The material clauses were:—

"1. I hereby offer to take you into my employment as saleswoman or in such other capacity as I may require at a weekly payment of 4*l.* 4*s.* Your employment is to commence on the 25th day of April, 1914, and to be subject to termination by a week's notice on either side and also to the terms and conditions of service hereunder written."

#### Terms and Conditions of Service.

"1. In these conditions the expression 'the master' means Mr. S. Konski trading as 'Konski' and the expression 'the assistant' means the said Emily Peet . . . .

"4. The assistant hereby expressly agrees not at any time during or after the determination of the said employment (whether the same shall be determined by notice or otherwise) directly or indirectly either on her own account or for any other person or for any firm or company to solicit interfere with or endeavour to entice away from the master any customer of or any person or persons in the habit of dealing with the master.

"5. The assistant hereby agrees not at any time after the determination of the said employment to advertise that she was 'late with,' or in the employment of, the master."

On May 30, 1914, the plaintiff discharged the defendant from his service, paying her 4*l.* 4*s.* a week up to date, 4*l.* 4*s.* in lieu of the week's notice, and 4*l.* 4*s.* as a gratuity. The defendant wished to continue in the employment until the expiration of the

NEVILLE J. week's notice, but the plaintiff refused to allow it. The defendant  
1915 was unable to obtain work for some months ; afterwards she met  
KONSKI Phillip Tolchinski, who had formerly been in the plaintiff's  
r. employment, where he was known as Phillip. He had since been  
PEET. carrying on a business similar to Konksi's in partnership with a  
Miss O'Sullivan, also a former employee of Konksi's, under the  
firm name of O'Sullivan & Phillip. They had not entered into  
any agreement and had advertised themselves as "late with  
Konksi." This partnership had recently been dissolved, and  
Phillip was carrying on a similar business alone. He offered  
Emily Peet the place of saleswoman in his business if she would  
assist him with some money. She applied to her brother, Harry  
Peet, and he advanced 100*l.* to Phillip for the purposes of his  
business, and by way of security Phillip entered into an agree-  
ment making Harry Peet a partner in his business with an equal  
share of profits, but with a power at any time to transfer his  
share in the business to Emily Peet. After the date of this  
agreement the business continued to be carried on under the  
name of Phillip, and the words "Phillip (Russian) late with  
Konksi" were used in advertisements. It was alleged that Emily  
Peet was in fact a partner with Phillip, and therefore the use of  
these words was a breach of her agreement with Konksi. It was  
also alleged that the defendant had personally signed and  
addressed circulars sent out by the firm of Phillip to old  
customers of Konksi, soliciting their custom.

The only customer to whom the defendant was proved to have  
addressed a circular signed by herself was a lady who, as the  
judge held, had ceased to be a customer of Konksi before the  
defendant's employment began.

*Jenkins, K.C.*, and *H. Johnston*, for the plaintiff. The cove-  
nant is not too wide and is not more than is reasonably necessary  
for the protection of the plaintiff's business. It does not pro-  
hibit the defendant from carrying on business at all, but only  
prohibits her from soliciting the customers of the plaintiff's  
business and from advertising that she was lately with him.  
The plaintiff properly determined her employment by payment  
of a week's salary in lieu of notice. He made no imputation

upon her at all, but, as she told him she was going to be married, NEVILLE J. and he did not wish to have married women in his employ, he dispensed with her services as he was entitled to do. As to the alleged partnership with Phillip we have made out a case for the defendant to answer. If she is indirectly a partner, then the advertisement is a clear breach of the stipulation not to advertise. As to soliciting the plaintiff's customers, she has signed certain trade circulars sent by Phillip to the plaintiff's customers among others.

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*Peterson, K.C.*, and *Harman*, for the defendant. It is submitted that the plaintiff on his own evidence has no case. The custom in the case of domestic servants of a month's notice or a month's salary in lieu of notice does not apply to a contract of service of this character: *Fawcett v. Cash*. (1) This is a case of wrongful dismissal, even although the defendant suffered only nominal damages. She was entitled to a week's notice and to serve that week, and the plaintiff by dismissing her summarily without notice committed a breach of contract. He thereby repudiated the contract on his part and the defendant was entitled to consider herself absolved from the contract on her part. The cases are collected in *Chitty on Contracts*, 16th ed. p. 705. Unless the plaintiff performed the whole of the contract he cannot claim the benefit of any clauses of it in his favour. The principle of *General Billposting Co. v. Atkinson* (2), *Brace v. Calder* (3), and *Measures Brothers v. Measures* (4) applies.

*Jenkins, K.C.* This objection is not raised in the defence. If the defendant's dismissal was wrongful, which is not admitted, she waived any claim by accepting the week's salary in lieu of notice and so released the plaintiff from his obligation to give the notice: *Boston Deep Sea Fishing and Ice Co. v. Ansell*. (5) Having accepted the money she could not bring an action for wrongful dismissal. *General Billposting Co. v. Atkinson* (2) does not apply. It is submitted that the defendant elected to accept the week's salary as a proper determination of her

(1) (1834) 5 B. & Ad. 904, 908.

(3) [1895] 2 Q. B. 253.

(2) [1908] 1 Ch. 537; on appeal

(4) [1910] 2 Ch. 248.

[1909] A. C. 118.

(5) (1888) 39 Ch. D. 339, 365.



NEVILLE J. services and that there was not a total, or any, repudiation of the contract by the plaintiff.

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NEVILLE J. I think the defendant's evidence had better be taken.

The defendant's evidence was then heard.

*Peterson, K.C.*, and *Harman*, for the defendant. As to the use of the words "late with Konski," the plaintiff's contention seems to be that anything done by either partner implicates the other. That is not so. The question depends on the construction of clause 4 of the agreement or on the authority given by the defendant to her partner. Clause 4 does not expressly or by implication include a partner; and no partner could say that the defendant had given him authority to do what he knew she had covenanted not to do. On the facts it is plain that there was no partnership between Phillip and the defendant, and if anything was done contrary to clauses 4 and 5 of the agreement, it was done by Phillip or his firm without the authority of the defendant. The advertisement complained of only states that Phillip is a Russian and was late with Konski. Both statements are true, and Phillip was not in any way restrained from making them.

As to soliciting customers, the only case in which the defendant was proved to have signed and addressed a circular was that of a lady who had ceased to be a customer of Konski before the defendant's employment began.

The covenant is too wide. There is no restriction as to time, and it would include customers who had ceased to be customers of Konski before the defendant entered his employment or had become his customers after she had left. That is plainly wider than was needed for the plaintiff's protection.

[NEVILLE J. Has the question as to customers ever been discussed?]

*Jenkins, K.C.* Yes, in *Mason v. Provident Clothing and Supply Co.*(1) There both Lord Haldane and Lord Shaw of Dunfermline expressed opinions that a restraint limited to customers generally would be good.

(1) [1913] A. C. 724, 734, 741.

*Peterson, K.C.* In those dicta it is plain that the Lords were NEVILLE J. referring to customers who had been canvassed by the covenantor. 1915

In *Nicholls v. Stretton* (1) the action was for damages for breach of covenant; the covenant was against an articulated clerk acting for clients generally, but the breaches complained of were confined to cases of dealing with persons who had been clients during the time of the clerk's articles, and the Court held the covenant could be confined to such persons.

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In *Baines v. Geary* (2) North J. held that the covenant was severable. In *Dubowski & Sons v. Goldstein* (3) the agreement was by construction limited to the present business of the employer. In *Mills v. Dunham* (4) the covenant was expressly limited to customers during the time of employment. *Underwood & Son v. Barker* (5) was not a case of soliciting customers, but of carrying on a similar business, and the covenant was held to be severable and if confined to the United Kingdom not too wide. The Court will not sever a covenant unless it is severable on the face of it: *Baker v. Hedgcock*. (6) There is no case in which it has been held that a covenant not to deal with persons who have been customers at any time is not too wide.

*Jenkins, K.C.*, in reply. There was no general repudiation of the contract by Konski in this case. Contracts of employment may be of two kinds—(1.) to pay wages; (2.) to provide employment. Here there is no contract to provide employment, and such a contract cannot be implied: *Turner v. Sawdon & Co.* (7) In *General Billposting Co. v. Atkinson* (8) there was a wrongful dismissal. In *Brace v. Calder* (9) there was a dissolution of partnership which was held to be a wrongful dismissal and so a repudiation, though the plaintiff was only entitled to nominal damages. Here there was no wrongful dismissal and no repudiation. At most there was a mistaken view on the part of both parties that a payment of wages in lieu of notice was sufficient.

(1) (1847) 10 Q. B. 346.

(2) (1887) 35 Ch. D. 154.

(3) [1896] 1 Q. B. 478.

(4) [1891] 1 Ch. 576.

(5) [1899] 1 Ch. 300.

(6) (1888) 39 Ch. D. 520.

(7) [1901] 2 K. B. 653.

(8) [1908] 1 Ch. 537; [1909] A. C.

118.

(9) [1895] 2 Q. B. 253.

NEVILLE J. I do not argue that this covenant is severable, but I say that  
 1915 on the true construction it ought to be confined to customers  
 KONSKI during the time of employment. That construction was adopted  
 v. during the time of employment. That construction was adopted  
 PEET. in *Mills v. Dunham*. (1) The judgments of the Court of Appeal  
 in *Perls v. Saalfeld* (2) show that the doctrine of construing a  
 document "ut res magis valeat" may be applied in this class of  
 cases.

If the Court is against me on this point, I rely on the dicta of  
 Lord Esher M.R. and Rigby L.J. in *Dubowski & Sons v.*  
*Goldstein* (3) that a covenant not to solicit customers of a  
 particular business, including customers who became such after  
 the date of the employment, may be good.

NEVILLE J. This case raises several points of interest and  
 importance with regard to the very difficult subject of the extent  
 to which contracts in restraint of trade by employees are  
 permissible as the law now stands. First of all, let me deal with  
 clause 5 of the agreement in question, which is this: "The  
 assistant hereby agrees not at any time after the determination  
 of the said employment to advertise that she was late with or in  
 the employment of the master." Now the advertisement which  
 is relied upon as an infringement of clause 5 is this: "Phillip  
 (Russian) from Konski." I think there is no doubt that the  
 reference here is to a Mr. Tolchinski who was spoken of when  
 he was in the employment of Konski as Phillip, and who is the  
 individual referred to as "Phillip (Russian) from Konski." But  
 then it is said if Miss Peet was a partner in a firm which traded  
 under the name of Phillip, this advertisement would be indirectly  
 a statement that she was late with, or in the employ of, the  
 master, because she was a member of a firm which is called  
 "Phillip" and which is said to be "(Russian) from Konski." In  
 my opinion the statement in the advertisement is no more  
 than this, that the man Phillip is a Russian and is from Konski,  
 and I do not think that that would be an advertisement that she,  
 Miss Peet, was late with or in the employ of the master even were  
 she a partner. Apart from that the question is not without diffi-

(1) [1891] 1 Ch. 576.

(2) [1892] 2 Ch. 149.

(3) [1896] 1 Q. B. 478, 482, 485.

culty, because the business relations between Miss Peet and her brother and Mr. Tolchinski are very indefinite and difficult to determine. I can only say that the plaintiff has not satisfied me that Miss Peet was a partner in the firm of Phillip & Co., although no doubt her brother, in what he did, was acting in her interests and not from any independent desire to enter into the business of ladies' tailor and furrier.

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Now that, I think, deals with all the questions that have been raised under clause 5, and now I have to consider the question under clause 4 arising from a proved case of a soliciting advertisement being sent to a lady whose name is inserted at the foot of the advertisement by Miss Peet, and undoubtedly, as she tells us, sent by her to the lady. The question arises whether in a case where there had been no dealings for a period of two years you can say that that is soliciting a customer or person in the habit of dealing with the master. I think it is very difficult to say that it is, because not only does the evidence show that the lady in question had ceased to deal with Mr. Konksi for a period of two years, but also that she had been since dealing with a firm of O'Sullivan & Phillip, a partnership in which Mr. Tolchinski had been a partner, which had been recently dissolved. It seems to me that it would be carrying the covenant too far to say that any person who had ever been a customer and who had ever dealt with the master was intended to be included, although they might have ceased to be customers of Konksi for an unlimited period of time.

Now I think I ought to deal with the other matters which have been argued before me, and first of all with regard to the question of the dismissal of Miss Peet from Mr. Konksi's employment. She was engaged under a weekly agreement at a weekly salary, and on the occasion in question Mr. Konksi gave her a week's salary and more, but I think that is immaterial; he paid her for the week which was due and gave her another week's salary for the forthcoming week, and told her that he did not wish her to return to his place of business. She undoubtedly did not accept that view; she was desirous of coming back, but he said no, he would rather that the severance between them should take place then. Now the question is, was that a breach of his



NEVILLE J. agreement with her or was it not? If the agreement between them involved his giving her employment while she was in receipt of her salary, then clearly it was a breach of his agreement because he refused to allow her to go on. In my opinion he had discharged the obligation which he had undertaken under his agreement by paying her the salary which he agreed to pay, and if he chose to pay her her salary and dispense with her services at the same time he was entitled to do so. That, of course, distinguishes the case from that of *General Billposting Co. v. Atkinson*. (1) If the discharge had been a breach of the contract, if he had contrary to the terms of the contract said "I will not employ you any longer," though it were only for a week, I cannot see that the principle which underlies the decision in that case could fail to be applicable to the present case. What that case means is this, that where you have an agreement of service for a time long or short, if the employer improperly puts an end to it, that is not a mere breach of the contract, but is in effect saying "I refuse any longer to employ you under the agreement," and that involves an abandonment of the agreement and entitles the employee to sue the master for damages.

That deals with the point in question, and then comes the question whether the form of the covenant in the present case is too wide—whether, in other words, the employer can satisfy the obligation, referred to in the cases cited, of showing that although it is in restraint of trade it is a reasonable contract between himself and his employee. Now with regard to the construction of the covenant my duty is to construe it in the first instance with my mind as free as possible from the question whether it is a valid or an invalid contract, and having come to the conclusion if I can as to what the meaning is, then to see how that is affected by the law. I do not think the cases cited as to the application of the legal doctrine "*ut res magis valeat*" applies unless you have in the first instance a real ambiguity to deal with. If the contract is reasonably plain, then you must give effect to the expressed intention of the parties, whatever the effect of that may be. Here it seems to me that it would be an unreasonable construc-

(1) [1908] 1 Ch. 537; [1909] A. C. 118.

tion of the agreement to hold it to apply only to those customers NEVILLE J. or persons in the habit of dealing with Mr. Konski who were so during the time of the employment of the defendant, Miss Peet. The covenant is entirely unlimited in time, and, in my opinion, it extends to all those who either at the date of the contract or at the date of its determination, or at any time thereafter, may be customers or in the habit of dealing with the master. Is that too wide? Opinions have differed as to whether such a contract relating to all future customers is, or is not, reasonable, and I have had to consider the dicta of several judges with regard to that matter. Some of them are dicta of judges in the Court of Appeal, and I wish to say with regard to that that the authority of the Court of Appeal rests with the Court and not with the individual. In my opinion a judge of first instance is not only not bound, but not entitled, to follow the dicta of other judges which are not in accord with his own judgment. In my opinion the extension of a covenant of this kind to customers at any future date is not reasonable. It appears to me to place the covenantor in an exceedingly awkward position, because he might at any time be quite innocently offending against the terms of the contract that he entered into. In this case I do not think there is any serious ground for suggesting that the question of severability arises. The covenant seems to me to be one complete covenant not to solicit any customer of, or any person or persons in the habit of dealing with, the master. I think that applies as much to any such person in the future as to any person who, during the employment, was, or had been, a customer of the master. In my opinion, therefore, the covenant here is too wide, and it is not severable, and consequently it is bad. The plaintiff's action fails and must be dismissed with costs.

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Solicitors: *Evelyn Jones & Co.*; *Stanley Evans & Co.*

J. R. B.

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Feb. 17.

*In re* TUBBS.DYKES *v.* TUBBS.

[1914 T. 1657.]

*Settlement—Equitable Tenant for Life and Remainderman—Freehold Ground Rents—Repairing Leases—Trustees’ “Costs of Management”—Costs of Survey—Costs of serving Notices to repair on Lessees.*

A testator who died in 1891 devised a freehold estate upon trust “to permit his wife to receive the rents, profits and income thereof during her life,” and after her death upon trusts for certain persons; and the testator empowered the trustees to “manage the said estate” until it should be sold and to pay “the costs of management” out of the rents and profits. The estate comprised 650 houses erected under long repairing leases granted to builders, and the ground rents amounted to 2100*l.* per annum. In 1913 the trustees incurred costs and expenses to upwards of 1100*l.* in having the estate surveyed and in having notices with schedule of repairs served on the tenants:—

*Held*, that the whole of these costs and expenses must be borne by the tenant for life.

#### ADJOURNED SUMMONS.

R. Tubbs by his will, dated December 12, 1889, devised his “Harlesden estate” to the plaintiffs upon trust “to permit his wife to receive the rents, profits and income thereof during her life,” and after her decease to pay thereout two annuities of 100*l.* as therein mentioned, and subject thereto the testator directed his trustees to apply the said income for the maintenance of the eight children of his cousin H. Smith as they should think fit until the youngest of such eight children should attain the age of twenty-one, at which period the testator directed the said estate to be equally divided between such of the said eight children as should be then living. And the testator empowered his trustees with the consent of his wife during her life to sell his said estate or any part thereof and to invest the proceeds as therein mentioned. And the testator declared that it should be lawful for his trustees “to manage the said estate” until it should be sold, and to repair and insure houses and buildings and to make allowances to and arrangements with tenants, and

also to delegate either expressly or by implication all the powers NEVILLE J. lastly thereinbefore contained to his wife during her life without being responsible for any loss occasioned thereby. "And also to pay the costs of management out of the rents and profits of the said premises."

The testator died in July, 1891. His wife survived him and was now eighty years of age.

The Harlesden estate was a freehold property in the north of London comprising some 650 houses erected about the year 1881 under repairing leases for ninety-nine years granted to builders at low ground rents, who had granted under-leases at rack rents. The total of the ground rents amounted to 2100*l.* per annum.

In 1913 the trustees, acting under advice, instructed a firm of surveyors to inspect the property and to report on its state of repair. In the result the trustees served notices to repair with scheduled dilapidations on a large number of the lessees, and such notices were complied with. The total costs, charges, and expenses of the trustees in respect of the surveyors' inspection and report and in the preparation and serving of the notices with schedules amounted to 1125*l.* 11*s.* 4*d.*, of which 39*l.* 16*s.* 6*d.* was paid by some tenants. The question then arose whether the balance of 1085*l.* 14*s.* 10*d.* was payable out of capital or income, and the trustees took out a summons to determine the matter.

*Fairfax Luxmoore*, for the trustees.

*J. Stirling*, for the tenant for life. The trustees have the legal estate with a discretionary power of management. The tenant for life is entitled to the whole of the income and is not bound to repair. These costs have not been incurred at the suggestion of the tenant for life and are not strictly management expenses. They are an extraordinary expenditure entirely for the benefit of the remaindermen. The trustees have a discretion and are not bound to pay these costs out of the income, and have come to the Court for directions. It is submitted, therefore, that the Court in the exercise of its equitable jurisdiction will apportion these costs between the tenant for life and remaindermen by directing them to be raised by a mortgage the interest on which

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NEVILLE J. would be kept down by the tenant for life: *Rowlls v. Bebb* (1);

1915 *In re Hotchkys* (2); *In re McClure's Trusts.* (3)

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*C. E. Dyer*, for the remaindermen. It is submitted that the whole of these costs must be borne by the tenant by life. The testator has given a very clear direction that the trustees' costs of management are to be paid out of the income. If only one house had been out of repair, it could hardly be contended that the costs of inspection and of serving a notice to repair were not payable by the tenant for life.

[He was stopped.]

NEVILLE J. I think this liability of the trustees forms part of their expenses in managing the estate, and, having regard to the terms of the will which direct the trustees to manage the estate and to pay the costs of management out of the rents and profits, they must be paid by the tenant for life out of the income. This is a hardship upon her having regard to the peculiar character of the estate, but I must deal with the case in just the same manner as if there had been only one or two houses.

Solicitors for all parties: *Corbould, Rigby & Co.*

(1) [1900] 2 Ch. 107, 116.

(2) (1886) 32 Ch. D. 408.

(3) [1906] W. N. 200; 76 L. J. (Ch.) 52.

H. L. F.

*In re* DAVIES.

NEVILLE J.

LLOYD *v.* CARDIGAN COUNTY COUNCIL.

1915

Feb. 17.

[1914 D. 1398.]

*Will—Charitable Legacy—Gift to Vicar and his Successors—Condition—Repair of Tombstones—Gift over on default in repairing to Non-charitable Object—Perpetuities—Police “Superannuation Fund”—Police “Pension Fund”—“Police Authority”—Parties—Police Act, 1890 (53 & 54 Vict. c. 45), ss. 1, 2, 7, 16, 18, 19, 22, 30, 33, 36; Scheds. I., III.*

A testator who died in 1914 by his will gave 50*l.* to the vicar of C. and his successors to be invested in trust security, and committed to their care and charge certain graves in the churchyard of C., “the same to be kept in good order and repair,” with a gift over of the trust fund “if the said vicar and his successors shall at any time fail to comply with these directions” to “the superannuation fund of the Cardigan-shire Constabulary.” There was no such fund, but the testator, as a retired member of the Cardigan Constabulary, had for many years received a pension paid by the Cardigan County Council under the provisions of the Police Act, 1890, which (ss. 1, 2, and 16) established a “pension fund” for the members of every police force or their dependants on retirement of a member or on his death whilst in the force; s. 22 provides that, if the assets of the pension fund should exceed the amount required for meeting the liabilities thereon, the Secretary of State may by a provisional order authorize payments out of the pension fund “for such purposes . . . as may seem expedient”; and s. 33 and the Third Schedule to the Act define the “police authority” of a county to be “the standing joint committee of the quarter sessions and the county council.” On an originating summons to determine the validity of the above bequests:—

*Held*, that the Cardigan County Council sufficiently represented the police authority of that county for the purposes of the summons.

*Held*, also, that there was a good gift of the income of the 50*l.* to the vicar and his successors as an accretion to the endowment of the living.

*Held*, also, that the testator had not sufficiently described the police “pension fund” as the object of the gift over; but if he had, that fund was not wholly a charity, and therefore the gift over on failure to repair the graves was void under the rule against perpetuities.

#### ADJOURNED SUMMONS.

David Davies was for many years a member of the Cardigan-shire Constabulary, and retired in December, 1901, on a pension payable by the Cardigan County Council under the provisions of the Police Act, 1890. By his will, dated March 11, 1913, he

NEVILLE J. appointed J. E. Lloyd and D. W. Davies his executors and, after directing that his body should be interred in the churchyard of the parish church of Cilcennin (in the will called Cilcenin) in the said county within the railings already erected in the churchyard around the graves of his parents and sisters, he continued as follows :—

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“I give fifty pounds to the vicar of Cilcenin and his successors to be invested in trustee security and I commit the care and charge of the said graves of my parents and sisters and of my own grave to the said vicar of Cilcenin and his successors the same to be kept in good order and repair with all names on tombstones including my own tombstone and railing to be painted and rebuilt and repaired when required. If the said vicar and his successors or any of them shall at any time fail to comply with these directions I desire that the sum of fifty pounds and the investment respecting the same shall go over to the superannuation fund of the Cardiganshire Constabulary.” And the testator, after bequeathing certain pecuniary legacies, gave the residue of his personal estate to the “police superannuation fund of the Cardiganshire Constabulary.”

The testator died in January, 1914, and was buried in the said churchyard, and a tombstone was erected over his grave with an inscription. His personal estate exceeded 600*l.*

There was no “superannuation fund of the Cardiganshire Constabulary” in existence either at the date of the testator’s will or of his death, but there was a police pension fund and a police fund, both of which were established by the Police Act, 1890.

The executors took out a summons to determine (1.) whether the bequest of 50*l.* to the vicar of Cilcennin and his successors as aforesaid was a good charitable bequest; (2.) whether there was a good gift over to the police pension fund; and (3.) whether or not the testator’s residuary estate was undisposed of.

The vicar of Cilcennin was made a defendant to the summons, but did not appear, and had intimated that he was not prepared to accept the responsibility of carrying out the trusts of the legacy of 50*l.* and the income thereof.

*Whitmore Richards*, for the plaintiffs. By s. 33 and the Third NEVILLE J. Schedule of the Police Act, 1890, the "police authority" of a county is the standing joint committee of the quarter sessions and the county council, and by sub-s. 1 of s. 33 the power of the police authority with respect to the accounting for and payment of sums to be carried to the pension or police fund and with respect to investments are to be exercised by the county council. The standing joint committee of the county of Cardigan have not been made parties to this summons, and it is submitted that the county council sufficiently represent the police authority for the purposes of this application.

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*Ernest Evans*, for the Cardigan County Council, and *A. B. Marten* (for *Gavin T. Simonds*, serving with His Majesty's Forces), for the testator's next of kin, raised no objection.

NEVILLE J. I think that is so.

*Whitmore Richards*, for the plaintiffs. As the vicar does not appear, the executors submit on his behalf that this legacy of 50*l.* to the vicar and his successors in trust is a good charitable legacy. It is an accretion to the endowment of the living and the vicar for the time being is only entitled to the income of the fund, and so far the bequest is unobjectionable. But whether the direction to repair the tombstones with a gift over on failure of that condition is valid depends upon whether the gift over is to a charity: *In re Tyler*. (1) It may be that the gift over fails and that the fund falls into the residue.

[He was stopped.]

*A. B. Marten* (for *Gavin T. Simonds*, serving with His Majesty's Forces), for the testator's next of kin. *In re Tyler* (1) is distinguishable. It was a gift of 42,000*l.* Russian 5 per cent. bonds to the London Missionary Society with a request to repair a vault. The gift was obviously and substantially for charitable purposes, and it could not be said that the whole income of the fund would be required to keep the vault in repair. The repair of the vault would be a trivial item and might be obtained from other sources. Here the gift is only 50*l.*, and it is obvious that

(1) [1891] 3 Ch. 252.



NEVILLE J. the whole object and intention of the gift is the perpetual repair of the tombstones and that probably the whole income of the fund will be required for that purpose. The direction to repair is imperative and the vicar is bound to comply with it. The gift therefore is for a perpetuity and is void, and the fund falls into the residue.

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*Ernest Evans*, for the Cardigan County Council, argued to the same effect.

NEVILLE J. I think this point is governed by the decision in *In re Tyler* (1) and that there is a good charitable bequest to the vicar and his successors.

*Whitmore Richards*. The next question is whether the gift over and the gift of residue to the superannuation fund of the Cardiganshire Constabulary are good gifts to the police pension fund.

*A. B. Marten* (for *Gavin T. Simonds*, serving with His Majesty's Forces), for the next of kin. The testator has not shown clearly what fund he intended to benefit. A superannuation fund is not necessarily a pension fund, and the testator has not sufficiently described the police pension fund. But if he has, it is not a charity, because although some of its objects are charitable, all are not. There is no authority that a police pension fund is a charity, but in *In re Douglas* (2) Kay J. suggests that "the police fund for officers of police who have lost their health and have been obliged to retire from the service" may be a charity. Here the police pension fund extends to other objects besides aged and infirm members of the force. Under s. 1 (a) and Part I. of the Third Schedule a constable may retire after twenty-five years' approved service, so that, if he enters the force at twenty-one or twenty-five years of age, he can retire at forty-six or fifty, and is not necessarily incapable of performing his duties. The pension fund is created by s. 16 and is made up by deductions from pay, fines, contributions from local or personal Acts, and certain other sums; and by sub-s. 3 any sums under the control of the police authority are to be carried to the pension fund

(1) [1891] 3 Ch. 252.

(2) (1887) 35 Ch. D. 472, 478.

except a fund held on a private trust. Then s. 18 provides for NEVILLE J. the investment of the pension fund and directs the surplus income to be invested, and s. 19 provides that if the income is insufficient for the expenses of the pension fund the deficiency is to be supplied out of the police fund by a district or borough rate. But the pension fund is not necessarily a fund in relief of rates, because s. 22 provides that, if the assets of the pension fund exceed its requirements, the Secretary of State by a provisional order may authorize the payment out of the pension fund of such sums and "for such purposes" as may seem expedient, and the purposes directed by the order might be other than charitable. The pension fund therefore is not a fund for wholly permanent charitable purposes, and the gift over fails and falls into residue which is undisposed of and goes to the next of kin. [*In re Bowen* (1) and *In re Donald* (2) were also referred to.]

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*Ernest Evans*, for the Cardigan County Council. It is submitted in the first place that the testator clearly intended and has sufficiently indicated the police pension fund as the object of his bounty. The Act of 1890 throughout its provisions takes for granted that the pension fund is the superannuation fund. Part I. of the Act, which deals with pensions, is headed "Superannuation of Constables," and s. 16 creates the pension fund and directs certain sums to be carried to that fund, including (sub-s. (f)) "any payments or contributions payable under the provisions of any local and personal Act to the pension or superannuation fund of any police force," and s. 30 adapts "existing pension or superannuation funds" to Part I. of the Act and directs (sub-s. 2) that existing pension or superannuation funds are to be transferred to the pension fund under the Act, and s. 36 repeals the Acts in the Fourth Schedule, one of which is the Police Superannuation Act, 1865. Secondly, the pension fund is a charity for three reasons. (1.) Sects. 1, 2, and 3 and the First Schedule of the Act provide a scale of pensions for aged or infirm or injured constables and their dependants; (2.) the fund is in relief of the rates because it is only when the income of the fund is insufficient that the deficiency is to be made good out of the rates (s. 19), and

(1) [1893] 2 Ch. 491.

(2) [1909] 2 Ch. 410.

NEVILLE J. if a pensioner is in receipt of parochial relief the pension may be paid to the guardians of the poor (s. 7), and that also relieves the rates. Moreover, under s. 22, sub-s. 2, investments on account of the pension fund may be discontinued, and a provisional order under sub-s. 1 of that section dealing with any surplus assets of the fund need not necessarily direct their application to non-charitable purposes. It might direct the surplus to be divided amongst necessitous or deserving officers, which would be a good purpose. (3.) The existence of such a fund clearly tends to improve the efficiency of the police force by attracting a better class of men, and that is an object in which the public are interested and is a good public purpose: *In re Good*. (1) It is submitted, therefore, that the gift over to the pension fund on failure to repair the tombstones is a good charitable bequest, and that that fund is also entitled to the residue.

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NEVILLE J. The testator in this case has by his will made a gift over of a legacy and a gift of residue to the superannuation fund of the Cardiganshire Constabulary. Strictly speaking, there is no such fund in existence, but I am asked to say that the fund he meant and intended is the police pension fund created under the Police Act, 1890. It does not seem to me that I can say that that is what the testator intended. But if the effect of the bequest is a gift to that fund, then it seems to me from s. 22 of the Act that the fund would not necessarily be confined to the relief of superannuated constables, nor would it be possible to determine what the ultimate destination of the fund would be. Under a provisional order the excess of the fund might be applied to charitable purposes and it might not. The ultimate destination of the fund is therefore quite indefinite and vague. No person is authorized by the statute to receive any augmentations to the pension fund. All that the Act says is—s. 18, sub-s. 3—that the surplus income may be invested, but its ultimate destination is then uncertain. I cannot therefore say that the testator intended the gift for the police pension fund, nor can I say that, even if he did, it is a good gift to a

(1) [1905] 2 Ch. 60, 66.

charity. I think therefore that the gift over fails, and that NEVILLE J. the residue, being undisposed of, goes to the next of kin.

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*Whitmore Richards.* As the gift over is not to a charity, it is submitted that the vicar and his successors are entitled to the income of the 50*l.* freed from the condition or obligation to repair the graves.

NEVILLE J. I think that is so, but I cannot direct the 50*l.* to be paid over to the vicar. It must be invested in a trust security.

Solicitors: *Busk, Mellor & Norris, for Lloyd & Son, Lampeter; Watkins, Pulleyn & Ellison, for Roberts & Evans, Aberystwith.*

H. L. F.

## GOLDSTEIN v. SANDERS.

EVE J.

[1914 G. 814.]

1915

Jan. 28, 29.

*Lessor and Lessee—Agreement for Under-lease—Covenant not to assign without Consent of Lessor, “such consent not to be unreasonably or vexatiously withheld”—Breach—Covenant running with Land—Assigns.*

By an agreement of March 7, 1900, to grant an under-lease of a house and garden, No. 45, M. S. Square, for twenty-one years, it was provided that the lease should contain covenants by the lessees not to carry on any business on the premises, or any part thereof, nor to assign or demise without the consent of the lessor, “such consent not to be unreasonably or vexatiously withheld,” and a power of re-entry for breach of any of the covenants. The lessees assigned the premises comprised in this agreement to H., the predecessor of the defendant. H. never took up a lease. In 1913 the plaintiff became entitled to the residue of the term of ninety-nine years granted by the head lease of these premises in 1856, and in February, 1914, she discovered that a part of the garden of No. 45 had been walled off and built upon for the purpose of being used in connection with the adjoining premises, No. 44, where an hotel was carried on by the defendant S. Her solicitors complained of this and various other irregularities. H. having asked the plaintiff's leave to assign the residue of his lease to S., consent was refused on February 6, 1914, without any reason being given. On March 19, 1914, H., without having obtained the consent of the plaintiff, assigned No. 45 to S. for the residue of the term of twenty-one



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years. It was admitted that S. was a respectable and responsible person. In an action by the plaintiff claiming to recover possession from S. :—

*Held*, that the plaintiff succeeded in the action, as her consent to the assignment had not been unreasonably or vexatiously withheld.

*Held*, also, that H. was bound by the covenant not to assign without consent, inasmuch as such a covenant ran with the land, and bound the assigns, although not mentioned.

THE plaintiff, Florrie Goldstein, claimed to be entitled to the possession of a leasehold house and garden, No. 45, Mount Stuart Square, Cardiff. The defendant, H. P. Sanders, was the owner of the adjoining house, No. 44, where he carried on the Imperial Hotel, and he claimed to be the underlessee of No. 45 by assignment. By the head lease dated December 24, 1856, the house and garden No. 45, Mount Stuart Square, together with other premises, were demised to John Mayor Haynes for ninety-nine years from September 29, 1852, at the rent and subject to certain covenants including a restrictive covenant against carrying on certain trades and erecting any building on the demised premises.

By virtue of divers assurances, and ultimately by a marriage settlement dated January 27, 1879, the premises comprised in the said lease became vested in the trustees of the settlement, Solomon Freedman and Abraham Freedman, for the residue of the term of ninety-nine years, upon the trusts in the settlement contained.

By a memorandum of agreement dated March 7, 1900, it was agreed that Jane Freedman, who was entitled as tenant for life under the settlement, should demise to Jane Williams and William Matthews Price, as tenants in common, the house and garden No. 45, Mount Stuart Square for the term of twenty-one years from June 1, 1900, at the yearly rent of 65*l.*, and that such lease should contain covenants on the part of the lessees, *inter alia*, not to carry on any business on the said premises or any part thereof, nor to assign or demise without the consent of the lessor, "such consent not to be unreasonably or vexatiously withheld," and a power of re-entry for non-payment of rent for twenty-one days, or breach of any of the said covenants.

By two indentures of November 6, 1912. and February 1, 1913,

William Matthews Price and Jane Williams respectively assigned their undivided moieties of the premises comprised in the memorandum of March 7, 1900, to Philip E. Hill for the residue of the term thereby agreed to be demised. These assignments were made without the consent of the lessor, but no objection was taken at the trial as to this.

By an indenture of November 3, 1913, the then trustees of the settlement of January 27, 1879, assigned to Florrie Goldstein the house and garden, No. 45, Mount Stuart Square, together with other premises, for the unexpired residue of the term of ninety-nine years granted by the head lease, subject as to 45, Mount Stuart Square to the agreement for under-lease of March 7, 1900. No lease was ever taken up by Mr. Hill.

On January 16, 1914, the plaintiff's solicitors wrote to Mr. Hill asking how W. M. Price came to assign his interest without any consent being obtained, and further stating that the premises were out of repair, and inquiring whether Mr. Hill was prepared to take up a lease and put the premises in proper repair. Mr. Hill referred them to his solicitors.

Subsequently, on February 3, 1914, after paying a visit to No. 45, Mount Stuart Square, the plaintiff's solicitors wrote to Mr. Hill stating that, on inspecting No. 45, Mount Stuart Square, they found that the adjoining property (No. 44, belonging to the defendant) had been demolished, and it had been found necessary to shore up part of No. 45; also that a part of the garden of No. 45 (about eight feet deep) had been walled off and incorporated with No. 44 for lavatory accommodation for the latter premises. They further complained of the assignments to Mr. Hill of the interests under the agreement of March 7, 1900, without the consent of the plaintiff or her predecessors in title, and said that these matters were most irregular and required explanation. In their reply on February 5 the solicitors for Mr. Hill and the defendant replied that Mr. Hill had agreed to sell his interest in the property to the defendant, H. P. Sanders, and, further, that the reconstruction of the Imperial Hotel on the defendant's premises was done with the knowledge of Mr. Hill, and that any claim arising out of the covenant against assignment had been waived. They added that they would shortly be

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On February 6, 1914, the plaintiff's solicitors wrote saying that their client could not consent to the proposed assignment in favour of the defendant, and that papers had been placed before counsel for his advice. On February 9, 1914, the defendant's solicitors made a formal application for the plaintiff's consent to the assignment to Mr. Hill and requesting an answer by the 23rd instant whether or not the plaintiff would grant it, and, if not, what the reasons for her refusal were.

No reasons were given beyond stating the fact that the matter was before counsel, and they could not act until his advice had been obtained.

On March 19, 1914, Mr. Hill, without having obtained the plaintiff's consent, and on the ground that it had been unreasonably and vexatiously withheld, assigned to the defendant the premises No. 45, Mount Stuart Square for the residue of the term agreed to be granted by the memorandum.

The plaintiff alleged that the assignment was a breach of the covenant in the memorandum of March 7, 1900, and claimed a declaration that the memorandum in question had determined, and to recover possession of the house and garden, with mesne profits from March 19, 1914. The main defence was that the consent had been unreasonably and vexatiously withheld, and the defendant did not admit that the consent to such assignment was necessary. He counterclaimed for specific performance of the agreement of March 7, 1900.

*Maugham, K.C.*, and *Ernest Rosher*, for the plaintiff. It is clear from the correspondence that at the date of the request for consent to the assignment the premises at No. 45 were in bad repair, and Mr. Hill knew that he was committing breaches of covenant by carrying on business on the premises and committing gross waste in other respects. He allowed the building of lavatories in the garden and also a new doorway to be made from the hotel premises into the remaining portion of the garden of No. 45, and the party wall to be pulled down and built up higher. Under these circumstances the plaintiff's

consent to the assignment cannot be said to have been unreasonably withheld. In any under-lease to be granted in pursuance of the agreement of March 7, 1900, a similar covenant to that in the agreement would have been inserted. It is well established that a lessor, in refusing consent to an assignment, is not bound to state his reasons: *Young v. Ashley Gardens Properties*. (1) The latest case on the subject is *Lewis & Allenby* (1909) v. *Pegge* (2), where a summary of the law is given. The tenant here is not in a position to claim specific performance, and it cannot be unreasonable to refuse consent to an assignment to one who is committing waste. If the defendant's claim had been put forward in good faith, the matter could have been dealt with on an originating summons, as in *In re Spark's Lease*. (3)

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*Clayton, K.C.*, and *A. Adams*, for the defendant. Mr. Hill, the assignee of the residue of the term of twenty-one years, is not bound by the covenant, as assigns are not mentioned, but if he was bound, then the consent to the assignment to the defendant by the plaintiff was unreasonably and vexatiously withheld. Taking the second point first. If the consent is asked and unreasonably withheld there is no right of action to compel the lessor to consent, or for damages, but there is a release from the operation of the covenant. The question is whether the refusal is reasonable when the assignee is a respectable and responsible person; that fact is admitted here. No reason was given by the letter of February 6, 1914, and the lessor must establish good reasons for the refusal when the matter comes before the Court: *Bates v. Donaldson* (4); *Young v. Ashley Gardens Properties*. (1) The first letter complained of want of repairs, and certain other alterations, but these were waived by subsequent receipt of rent. Our further contention is that the covenant is not binding at all, as "assigns" were not mentioned: *Spencer's Case*. (5) The assignment to Mr. Hill was made without the consent of the lessor having been obtained, and that consent was waived. The covenant in

(1) [1903] 2 Ch. 112.

(4) [1896] 2 Q. B. 241.

(2) [1914] 1 Ch. 782.

(5) (1583) 1 Sm. L. C., 11th ed.

(3) [1905] 1 Ch. 456.

p. 55.



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question here does not run with the land: *West v. Dobb* (1), where Blackburn J. in the note on p. 637 is reported to have said that the judgment in the case of *Williams v. Earle* (2) did not decide more than that the covenant ran with the land and bound the assignee, "assigns" being mentioned. Further, there was no legal assignment of the under-lease: the covenant not to assign points to a legal assignment, not to an agreement for a lease, or an equitable assignment as here. There has been no breach of the covenant therefore: *Gentle v. Faulkner*. (3) The power of re-entry for breach of a covenant will always be construed strictly by the Court, and the evidence here of the reasonableness of the refusal to consent must be very strong. The waste alleged was not committed by an "assign" of the lease, and an "underlessee" has been held not to be ordinarily included in the term "assigns": *Wilson v. Twamley* (4); *Bryant v. Hancock & Co.* (5); *Foa on Landlord and Tenant*, 5th ed. p. 244. Further, waste cannot be committed against a termor: *Jones v. Chappell*. (6)

*Maugham, K.C.*, in reply. The covenant not to assign does touch and concern the demised premises and runs with the land. It comes within the first resolution in *Spencer's Case*. (7) The landlord is entitled to re-enter on breach of a restrictive covenant running with the land, and it is his only effective remedy here. Such a covenant as this is binding on the underlessee.

EVE J. In this action the plaintiff seeks to recover possession of a house in Mount Stuart Square, Cardiff, on the ground of a breach by the defendant's predecessor of a covenant contained in an agreement dated March 7, 1900, not to assign the premises without the consent of the lessor, such consent not to be unreasonably or vexatiously withheld. Nothing has transpired in the course of the hearing reflecting on the integrity or good faith of either of the litigating parties, still less on the responsibility or respectability of the defendant, the only question being the ascertainment of their legal rights in the

(1) (1869) L. R. 4 Q. B. 634, 637, n.

(5) [1898] 1 Q. B. 716; [1899]

(2) (1868) L. R. 3 Q. B. 739, 750.

A. C. 442.

(3) [1900] 2 Q. B. 267.

(6) (1875) L. R. 20 Eq. 539.

(4) [1904] 2 K. B. 99, 106.

(7) 1 Sm. L. C., 11th ed. p. 55.

events which have happened. In November, 1913, the plaintiff became assignee of a lease of the premises in question, which were at that time sub-let under the agreement I have just referred to for a term of twenty-one years from June 1, 1900. The plaintiff's interest in the premises is the residue of a long term expiring in September, 1951. Shortly after the plaintiff became assignee of the reversion she made some inquiry as to the condition of the premises, with the result that early in 1914 steps were taken to get the premises repaired in accordance with the provisions of the agreement.

In the first instance notice requiring the premises to be put into repair was served on one of the original underlessees, Dr. Price. This caused some delay, but ultimately the plaintiff got into communication with Mr. Hill, the defendant's predecessor. [His Lordship then summarized the correspondence which passed, beginning with the letter of January 16, 1914, to Mr. Hill, and said that the state of things existing on the premises was little short of being outrageous. He then continued.] The plaintiff received no explanation of the state of things which was complained of. Had she been owner in fee, a refusal in these circumstances to give her consent to the proposed assignment would, in my opinion, have been quite reasonable, still more so seeing that she is not owner in fee but a lessee bound by covenants of which the existing state of things would seem to evidence more than one flagrant breach. Mr. Adams has satisfied me by his interesting argument that the question as to the true legal position of the plaintiff when this action was commenced was one of some difficulty, but the interesting points which he has suggested as being involved therein do not, in my opinion, call for decision on this occasion.

The plaintiff having discovered that her under-tenant, without the slightest notice to her, and without obtaining any consent from her, had embarked upon this transformation of her property, is called upon within a limited time to give her consent to the proposed assignment by Mr. Hill to the defendant. Small wonder is it that her solicitors replied at once that their client would not consent; no reasonable person could have advised her to take any other course, nor can I imagine any prudent man

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discovering what the plaintiff had discovered being willing to consent to the assignment, and to defer to a subsequent date the questions of his remedies against the assignor and his own position with the ground landlord. On the facts, the action on this point is in my view an undefended one. I cannot conceive any condition of things which would make the plaintiff's refusal more reasonably or less vexatiously withheld. But it is said that the plaintiff is not entitled to succeed unless the conclusion is arrived at that Hill was in fact bound by the covenant against assignment, and it is submitted that he was not so bound. I think the proper way to approach that question is to ascertain what would have been Hill's position had this agreement been in fact superseded by a lease. Would not any lease granted to Hill pursuant to this agreement, either in an action for specific performance of the agreement or otherwise, have contained a covenant on his part to the effect of this covenant in the executory agreement? I have no doubt it must have done. His claim to the lease would have been as assignee of the agreement—in other words a claim to have the agreement treated and enforced as though his name had appeared therein in place of the names of Jane Williams and William Matthews Price, a position from which this result follows, that he must undertake the same obligations and submit to the same covenants and conditions which they agreed to undertake and submit to.

For these reasons I think Hill is bound by the covenant, but apart altogether from these considerations I am of opinion that the covenant not to assign without the consent of the lessor is one which, on the balance of the authorities, runs with the land and binds the assigns although not mentioned. I think there has been a breach of the covenant here, although it is of a qualified character, and that there must be judgment for the plaintiff in the action for recovery of possession, with costs, and I must dismiss the counter-claim with costs. The plaintiff will also be entitled to mesne profits at the rate of 65*l.* a year from the date of the assignment to the defendant.

Solicitors: *Sidney Smith & Son*; *Bell, Brodrick & Gray*, for *Cousins & Botsford, Cardiff*.

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*Company—Prospectus—Misrepresentations—Directors—Liability—Reasonable Ground for believing Statements to be true—Uncorroborated Statements of Promoter—Damages—Companies (Consolidation) Act, 1908 (8 Edu. 7, c. 69), s. 84.*

In an action by a shareholder against the directors of a company to recover damages for misrepresentations in the prospectus on the faith of which he had taken shares, the directors pleaded as a defence that they had reasonable grounds for believing, and did believe, the impugned statements to be true:—

*Held*, that the uncorroborated statements of a vendor and promoter afford, by themselves, no reasonable ground for believing them to be true.

The existence of a reasonable ground for belief in the truth of any statement is established by the proof of any facts or circumstances which would induce that belief in the mind of a reasonable man, that is to say, a man who stands midway between the careless and the over-cautious man.

Duties and obligations of directors to test accuracy of statements in a prospectus discussed.

In this action the plaintiff, William Henry Adams, sought to recover damages against the directors of the Stolz Electrophone Company (1913), Limited, in respect of false statements in the prospectus of the company. The directors were Sir John Edward Thrift (retired Chief Inspector of Stamps and Taxes for the United Kingdom), Lord Rosmead, Robert Arthur Buddicom, J.P., and Dr. George Fernandez Clarke. The managing director and promoter of the company, Joseph Holt, had become bankrupt, and his trustee in bankruptcy was a defendant to the action.

The prospectus of the company was issued on June 25, 1913, the capital being 60,000 shares of 1*l.* each, of which 35,000 shares were offered for subscription. It was stated in the prospectus that the company was formed primarily to acquire and take over as one going concern the business of the Stolz Electrophone Company (London) Limited, of 85, Fleet Street, London, E.C., established in 1909, and the old-established business of the Homer Earphone Company of New York, together with plant,



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machinery, furniture, and patents, to which the vendor company was entitled in connection with the said businesses. Then followed a list of nine patents, stated to be very valuable, by which the electrophone (a telephone for the deaf) and other instruments dealt in by the company were protected. Amongst other statements there were two paragraphs as follows:—

“The business of the American company has throughout its existence been of a highly remunerative character, and that of the London company has developed very rapidly since its inception in 1909 as evidenced by the increase in the turnover as follows:—

|                               | £      | s. | d. |
|-------------------------------|--------|----|----|
| Year ending June 19, 1910 . . | 11,923 | 9  | 5  |
| “ “ “ “ 1911 . .              | 23,065 | 8  | 1  |
| “ “ “ “ 1912 . .              | 26,474 | 7  | 4  |
| “ “ “ “ 1913 . .              | 32,615 | 13 | 3  |

“The English business was originally started with the small capital of 1000*l.* subsequently increased to 10,000*l.* and thereafter to 20,000*l.* acquiring therewith the sole rights of the business in Great Britain, Europe and the East. At the present time the Stolz Electrophone Company (London), Limited, are operating over 175 branches and agencies in various parts of the world.”

The prospectus further stated that the purchase price was to be 50,000*l.*, which included 10,000*l.* for goodwill, and the profits of the company were estimated to be over 20*l.* per cent. per annum. It was alleged in the statement of claim that there was no such company as the Homer Earphone Company in existence, and that certain of the statements set out above were untrue. On the faith of this prospectus and relying on these statements the plaintiff subscribed for 400 shares in the company of 1*l.* each and paid for them in full in cash. He afterwards transferred 100 of these shares to others, but retained 300. The plaintiff did not charge the defendants with fraud, but alleged that the false statements in the prospectus were made by the defendants recklessly and without knowing or inquiring whether they were true or false, and he claimed repayment of 300*l.* with interest. The defendants denied the alleged misrepresentation,

and Sir John Thrift and Dr. Clarke pleaded, alternatively, that if any of the alleged statements contained in the prospectus were misrepresentations they had reasonable grounds for believing, and did, up to the time of the allotment of the shares, in fact believe, that the said statements were true; and they relied upon the Companies (Consolidation) Act, 1908. The grounds for this reasonable belief were set out at length in particulars delivered by these defendants.

Lord Rosmead in his statement of defence (by his guardian ad litem) pleaded that before joining the board he had caused the books and accounts of the old company to be investigated by a firm of chartered accountants who reported on March 4, 1913, that the business appeared to them successful and profitable, and one which he could be recommended without risk to become associated with. He and Mr. Buddicom alleged that a company called the "Mears Earphone Company" was really the same as the Homer Earphone Company and it was the business of the former that was acquired. These directors also alleged that they had reasonable grounds for believing that the impugned statements in the prospectus were true, and all the directors affirmed that the statements in the prospectus were based on information supplied by Joseph Holt. The other facts relating to the conduct of each of the four directors sufficiently appear from the judgment of the Court.

Collectively the directors took no steps to test the truth of the misrepresentations complained of. Each of the directors, with the exception of Lord Rosmead, gave evidence as to the course he had taken.

*Maugham, K.C.*, and *Ashton Cross*, for the plaintiff. With regard to the plea of the statute (the Companies (Consolidation) Act, 1908, s. 84), on the evidence there is no reasonable ground established by the directors for their belief that the impugned statements were true. There was only the word of the promoter, and that is not enough. There is no reported case in which that point has been expressly decided: *Palmer's Company Precedents*, 11th ed., Part I., p. 217.

*E. M. Pollock, K.C.*,<sup>a</sup> and *Barrington-Ward*, for Sir John

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Thrift. There was a real business of a prosperous kind carried on by the London company, and there were 5000 customers on the books; if properly managed, it was a business which gave hope of success. The plaintiff himself admits that he thought it was a good thing. On the whole there was reasonable ground for this defendant's belief that the statements were true; he made many inquiries from Mr. Holt for books and accounts and was put off by excuses. The case of *Stevens v. Hoare* (1) is in our favour.

As to damages, the shares when allotted were of some value, the business having a real potential value: *McConnel v. Wright*. (2)

*C. M. Le Breton, K.C.*, and *Edward Jennings*, for Lord Rosmead. This defendant is in a better position than the other defendants; he was entitled to rely upon what the chairman had done, and did in fact have a report made.

*Mr. Buddicom* in person.

*David White*, for Dr. G. F. Clarke. This defendant was only concerned in the medical side of the business. He did not in fact know of the statements in the prospectus and signed it after the three other directors had signed, and ought not to be held responsible for it. He honestly believed the statements to be true, relying on what Mr. Holt said: *Dovey v. Cory* (3); *Stevens v. Hoare*. (1)

*Maugham, K.C.*, in reply. There was unpardonable carelessness and negligence on the part of all these directors. A person cannot have an agent for believing. They relied on Mr. Holt's statements. How could Dr. Clarke honestly believe all the statements in the prospectus to be true when he did not know what the statements were?

As to the damages, the shares were worthless at the date of allotment, and the company ought never to have gone to allotment. The damages should be 300*l.*, the amount paid for the shares.

EVE J. This is a deplorable case, for it is, I think, clear that all the parties who have taken part in this trial were the victims

(1) (1904) 20 Times L. R. 407.

(2) [1903] 1 Ch. 546.

(3) [1901] A. C. 477.

of the unscrupulous individual who, in accordance with long-established precedent, is conspicuously absent when the tale of his rascality comes to be told.

The litigation arises out of the circumstances surrounding the promotion of a company called the Stolz Electrophone Company (1913), Limited, which I shall hereafter refer to as "the company." It was incorporated on April 17, 1913, with a capital of 60,000*l.* in 1*l.* shares, and on or about June 25 its prospectus was issued inviting subscriptions for 35,000 of such shares. At the time of the issue of the prospectus the defendants, Sir John Edward Thrift, Lord Rosmead, Mr. Robert Arthur Buddicom, and Dr. George Fernandez Clarke, were all directors of the company, and as such signed a copy of the prospectus in accordance with s. 80 of the Act. On June 26 or 27 and 30 the plaintiff subscribed for two lots of 200 shares and within a few days after the latter date received from the company two notices stating that 400 shares had been allotted to him. In due course he paid to the company the full sum of 400*l.* in respect of the shares.

It has been proved before me—indeed the contrary contention has not been seriously persisted in, though the plaintiff has been required to establish his case on this head—that the prospectus contained several untrue statements on very material points, including those of which particulars are given in the statement of claim. It has also been proved, as I hold, that the plaintiff subscribed for the 400 shares on the faith of the prospectus, and in the belief that the statements contained therein were true. He does not deny that he had some information and some knowledge of the business which the company was about to acquire from sources outside and independent of the prospectus. He had seen some months before a circular enlarging on the success to which the business had attained in the hands of the Stolz Electrophone Company (London), Limited, a company which throughout the proceedings has been referred to and which I shall continue to refer to as "the London company." He had observed with his own eyes on occasions when he had visited the offices of the London company at 85, Fleet Street the busy and apparently prosperous trade being done there; he had

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tried with some success for a member of his family one of the instruments sold by the London company; and, finally, he had been induced by statements made by Holt as to the dividends (amounting to 36 per cent. per annum) which were being distributed monthly amongst the shareholders of the London company, and by representations of the profit awaiting those shareholders when the London company's business came to be sold to the company, to invest 300*l.* in shares of the London company. But all this created, as it was, of course, intended to create, in his mind what I may perhaps call an attitude of receptivity, and I believe him entirely when he says that he applied for his shares on the faith of the prospectus, and that his faith was stimulated and confirmed by the careful process of "ground-baiting" which Holt appears to have also adopted with some others of his victims.

The foregoing facts being proved, and it being clear that the plaintiff has sustained loss or damage, the statutory liability of each defendant to pay compensation under s. 84 of the Act is established, unless he can prove with respect to every untrue statement that he had reasonable ground to believe, and did up to the date of the allotment of the shares believe, that the statement was true. From this point, therefore, the case of each defendant has to be considered apart from his co-defendants. It is obvious that one defendant may well be able to discharge the onus which lies upon him, although none of his co-defendants can do so. But there are several matters common to the cases of all the defendants, and I will deal with these first. Before I do that, however, I should like to say that I entirely acquit each of the defendants Sir John Edward Thrift and Dr. Fernandez Clarke of any conduct in this case or in this unfortunate promotion reflecting on his personal honour or integrity. Further than that, I am satisfied that each of them has given his evidence with truthfulness, and I believe certainly in the case of Sir John Thrift that he believed in the truth of the statements in the prospectus at the time of its issue and also when he was a party to the allotment. Dr. Clarke I am satisfied thought that all the statements in the prospectus were honest and truthful, but I cannot hold that he believed every statement to be true, not

because I doubt what he has said, but because I feel it impossible to hold that a man can have believed statements to be true when at the same time he admits he had no knowledge what the statements were.

With regard to Mr. Buddicom, I am constrained to say that I cannot place him in exactly the same position as the defendants to whom I have just referred. It may be due to his inexperience in these matters, but it would be impossible to say that he has shown himself a satisfactory witness. I do not say there is any ground for reflecting on his integrity, but I think I am bound to hold that he did not believe, and could not have believed, that these untrue statements were all true. At the conclusion of his evidence, in the course of which he had made several pregnant admissions, he was compelled to admit that his evidence that the statement as to the acquisition of the Homer Earphone Company really referred to the acquisition of the Mears Earphone Company was quite inconsistent with the answers given in the earlier part of his evidence, to the effect that the working agreement between the Mears Company and the London company, subsisting when the prospectus was issued, constituted, in his opinion, a valuable, if not the most valuable, part of the goodwill of the London company then about to be acquired by the company. Finally, as regards Lord Rosmead, who is not in a condition of health to give evidence, while nothing has transpired against his honour, I have unfortunately no evidence to support the allegation that he, at the date of the issue of the prospectus or at any other time, believed the statements to be true.

These conclusions really dispose of the defences of the defendants other than Sir John Thrift, but I propose now to deal with the case on the footing that each of the defendants has satisfied me that he did, down to the date when the shares were allotted, believe in the truth of the untrue statements. On that footing and on my finding of fact, so far as Sir John Thrift is concerned, there is left open the all-important question whether any one of the defendants had any reasonable ground for believing that the untrue statements were true. In approaching this question it is, I think, necessary to consider, as affecting all the

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defendants, first, the untrue statements; secondly, the subject-matter in relation to which they were made; thirdly, the facility or difficulty of testing the truth of each statement; and, fourthly, what steps, if any, the defendants collectively took to make the test, and as affecting each defendant; fifthly, what steps, if any, he individually took, and on what grounds he based his belief.

Let me deal shortly with these various matters. The untrue statements in this case are, for the most part, simple statements of facts, not statements of opinion or conclusions formed or drawn from the perusal of documents, or the collation and investigation of a series of incidents or facts. I select four: (a) the statement that the instruments dealt in are protected by the nine enumerated patents; (b) the statement that the business of the American company had throughout its existence been of a highly remunerative character; (c) the statement as to the turnover of the London company; and (d) the statement as to the branches and agencies. Each of these is a deliberate statement of fact in reference to a particular subject-matter, and a statement which is either wholly true or wholly false, and not capable of having any equivocal construction placed upon it. In the next place no possible doubt can be entertained as to the subject-matter to which each statement relates—the first to the nine specifically enumerated patents; the second to the only American business referred to in the prospectus, the Homer Earphone Company of New York; and the third and fourth to the London company's business. Each subject-matter constituted an item of the assets about to be acquired by the company, and was, therefore, an item in the true value of which the new company was very materially interested. Having reached this point, can there be any difficulty in forming an opinion as to whether the truth of these statements could have been tested with facility or difficulty? The statements related to existing assets—to actually current businesses then about to be transferred to the company for which the directors were then about to pay away the company's capital. What would have been easier than to put each one to the obvious and appropriate test?

The lawyer might properly have been appealed to for verification of the statement as to the patents; possibly he might have

suggested further resort to a competent patent agent, but the first person to whom anybody really desirous of being satisfied as to the truth of this statement about the patents would have applied must have been a lawyer; and in the same way the auditor, or some other competent and independent accountant, could have been requested to give a certificate as to the profits of the American business, and the turnover of the London business; and the same means might have been utilized for verifying the statement as to the agencies and branches. I cannot conceive a case in which the necessity for verification could be more apparent, or the means of obtaining it more obvious. Unfortunately, the defendants collectively did nothing. On the evidence, as it stands, no inquiries were made, no proofs were called for, no questions were asked, no advice was taken, and no investigation whatever was made by the board. As a board they seem to have treated the settling and approving of the prospectus, prepared and put before them by the man whose interest it was to exaggerate and inflate the value of everything the company was about to acquire, as a mere formality. Counsel for one of the defendants contended that the arguments advanced on behalf of the plaintiff involved this consequence, that no director could discharge the onus of proving that he had reasonable ground for believing a statement to be true without showing that he had separate advice from his own lawyer, his own accountant, and, may be, from his own patent agent. I do not agree. In my opinion the existence of a reasonable ground for belief in the truth of any statement is established by the proof of any facts or circumstances which would induce the belief in the mind of a reasonable man, that is to say, a man who stands midway between the careless and easy-going man on the one hand and the over-cautious and straw-splitting man on the other. Who will deny that such a man might reasonably believe in the truth of statements verified by competent and independent agents, instructed not by him individually, but by or on behalf of a board of directors of whom he was one? Had the board here collectively made or set about making an investigation such as I have indicated, and had that investigation led to a report that the statements were founded on fact and were substantially

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true, there is little doubt but that each member of the board might and would have been held to have had reasonable ground for entertaining the belief that the statements were true. But in my opinion nothing was done in this case by the defendants collectively which even suggests the existence of a reasonable ground for any one of them believing the untrue statements to have been true.

I pass, therefore, to the consideration of what each did individually, and I will deal first with the case of Lord Rosmead, because a precaution he took has been relied upon by his co-defendants as something assisting each of them. Lord Rosmead, whose name was mentioned to the promoter by Dr. Clarke, was invited to become a director of the company, and I assume, although this has not been strictly proved, that before he accepted the invitation he consulted his solicitor, the late Mr. Lacey, and it appears (as a matter of inference rather than proof) that Mr. Lacey obtained certain accounts and particulars from Holt, of which I know nothing, and laid them before some accountants with instructions (not produced) which led ultimately to their making a report. The report, it is conceded, may be treated as being in evidence, but it has not been relied on by Lord Rosmead's counsel because it is not suggested that he ever saw it. But what did happen was that the solicitor having received the report wrote this letter to Lord Rosmead: "March 11, 1913. My dear Lord Rosmead,—The accountants report that the Stolz is quite satisfactory; it is evidently a good thing, and I am writing to them that you are very pleased to confirm your appointment as director." And the letter which he there refers to is dated the same day, is addressed to Holt, and is in these terms: "Dear Sir,—Stolz Electrophone Company, Ltd." "The accountants' report is quite satisfactory. I have written to Lord Rosmead to this effect and he is pleased to confirm his appointment as director."

The appointment as director was the appointment thereafter to be made as a director of the company not then formed. There the matter ends. Unfortunately Lord Rosmead is not competent to give evidence; his solicitor is dead; and the matter rests on that letter of March 11, 1913. All that letter does is to

inform Lord Rosmead that the Stolz is a good thing and that the condition of things is such as to justify him in accepting the invitation to be a director. It is written in March, 1913. How can that possibly be relied on as sufficient to warrant a belief by Lord Rosmead in the truth of definite statements of fact made in a prospectus which was not issued until June 25 following? It only shows that Lord Rosmead was cautious before accepting the directorate, and that he did not lend his name to this concern without obtaining some evidence that it was a respectable concern; but it affords, in my opinion, no evidence to prove that Lord Rosmead ever had any reasonable grounds for believing statements which did not come into existence for months afterwards to be true. Unfortunately for him he has not been able to inform the Court whether he took any further steps. I have to deal with the case as it stands, and, as far as he is concerned, I am bound to hold that there is no evidence to support the contention that he had reasonable ground to believe these false statements to be true.

I pass now to the case which it is convenient that I should deal with next, that of Dr. Clarke. I said in the course of the argument, and I now repeat, that in my opinion the uncorroborated statements of a vendor and promoter afford by themselves no reasonable ground for believing them to be true. In many cases they ought to and do afford very good ground for exciting doubt and mistrust, where for example they are of a flamboyant and exaggerated character. I cannot conceive any reasonable man accepting the mere statement of the vendor that his business had returned a profit of 50 per cent. as sufficient proof of the fact to enable him to say he believed it to be a fact. I do not mean to say that this was all that Dr. Clarke had to go upon. I believe him when he says he had the affirmative answer made by Holt to his precise and definite question "Are the statements in this prospectus true? Is it all right?" But after all that answer was but the assertion of a man whose statements, standing alone, afforded no reasonable foundation for a belief in their truth.

In addition, Dr. Clarke, as the result of inquiries made of professional men competent to form an opinion, had ascertained that the instrument supplied by the London company, and of which

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EVE J.      the new company was going to take over the sale, was a success ;  
1915      that is to say, it was not a mere quack affair, but really did  
ADAMS      alleviate to some extent the infirmity for the relief of which it  
v.      was designed. He knew further that he had as colleagues men  
THRIFT.      all of whom he believed, and one of whom he knew to be  
            respectable and honourable, and when Holt produced to him a pro-  
            spectus signed by all these colleagues and added this piece of  
            information that Sir John Thrift had gone into the whole matter  
            with a thoroughness which had become irksome and even  
            offensive, one can well understand how it was that he added his  
            signature and allowed the prospectus to be circulated with his  
            name thereon. But the question I have to consider is whether all  
            these matters taken together afforded a reasonable ground for  
            Dr. Clarke's believing that the prospectus was truthful. I do  
            not think they did. If the uncorroborated statements of the  
            promoter afford no ground, they require something stronger in  
            the way of corroboration than Dr. Clarke ever obtained before a  
            reasonable ground for belief has been attained. Dr. Clarke's  
            evidence shows that unfortunately he did not appreciate the  
            duties and obligations he was undertaking as a director, and  
            personally he had seen nothing in the conduct of his co-  
            directors calculated to lead him to conclude that they appreciated  
            more than he did the duties and obligations of the office. As I  
            have already said, collectively they had done nothing; and the  
            only individual action of which Dr. Clarke had any knowledge  
            was that evidenced by Mr. Lacey's letter to Lord Rosmead, a copy  
            of which Holt showed to him. The rest of his information on  
            these matters came from Holt. In these circumstances I regret  
            to say that I cannot hold that he had any reasonable ground for  
            believing that the false statements in the prospectus were true.

The next case with which I deal is that of Mr. Buddicom. Mr. Buddicom has left on my mind the impression that he knew rather more than his co-directors did. He seems to have been in very close association with Holt for some months prior to the promotion of the company, lending him large sums of money, cashing his post-dated cheques, lending considerable sums of money to the London company, and taking in repayment cheques, sometimes of Holt, sometimes of customers of the

business, and bills ; and I do not accept his evidence that he was so indifferent or careless about these matters that he had no knowledge of what the London company, or Holt, owed him when the company was floated, and cannot even now tell us whether he in fact paid Holt a sum of 750*l.* in cash in August or September, 1913. All that evidence created an impression for which Mr. Buddicom has only himself to thank, that he was not giving his evidence with the frankness which characterized the evidence given by Sir John Thrift and Dr. Clarke. Apart, however, from these considerations he has not suggested any ground upon which he based his belief different from those relied upon by Dr. Clarke, except that he has produced a letter which he received from one Thorpe on or about June 11, 1913. I have very grave doubt as to the bona fides of that letter. I have not seen Thorpe in the box, and I think it may well have been written, regard being had to all the circumstances and the somewhat close association subsisting at the time between these three, Buddicom, Thorpe, and Holt, for the express purpose of protecting Buddicom against any such claim as is made in this action. But, whether this be so or not, it is impossible to read that letter as affording any additional grounds for Mr. Buddicom's belief. The letter in terms states the writer's opinion that it is for Mr. Buddicom to satisfy himself as to the truth of the statements ; and I decline to believe that an intelligent man like Mr. Buddicom could have read that letter without appreciating the writer's clear advice, " If you want to protect yourself, satisfy yourself that the statements are true." He took no steps so to do ; and in his case also I am bound to hold that there was no reasonable ground for his belief.

I come last of all to Sir John Thrift. If I eliminate statements made to him by the promoter, verbal or, as in the case of the signed accounts, written, what have I left ? I think I can sum up the position by a sort of debtor and creditor account. On the credit side I put the fact that he was frequently at the office of the London company, and when there saw a large business being transacted, and further that he saw Mr. Lacey's letter to Holt and a copy of Lacey's letter to Lord Rosmead. But with that I

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have come to the end of all I can put on the credit side. What have I on the debit side? An accumulation of incidents calculated at least to put any business man on inquiry and on his guard, if not to create an atmosphere of suspicion in his mind—and more particularly in the case of a business man possessing the peculiar knowledge which Sir John Thrift's long discharge of public duties has enabled him to acquire. He asks, naturally, for the books of account of the business about to be purchased, not once, nor twice, but over and over again; and every time he is met with some transparently plausible excuse for their non-production. Failing the books he presses for the accounts and balance-sheets. Here is a company which had been carrying on business for nearly four years, and he is told that there had never been any accounts made up. It might be that being a company in which the shares were held by a few persons a disinclination to disclose to possible rivals the result of the trading had resulted in the accounts not being published, but it could not have prevented their being kept; and somewhere or other there must have existed some record of the trading, some document showing the profit and loss of the business. But Sir John accepts the position and rests satisfied with some summaries of receipts and expenditure, and a statement of the turnover signed and produced by Holt; and this notwithstanding that there had been then brought to his knowledge a transaction of a kind with which he is familiar but which he regarded as reprehensible in the extreme, and one which could only have been adopted by a man possessing what Sir John has been pleased to call "an elasticity of conscience." In order to escape the payment of the English income tax an intermediary company had, according to Holt's admission, been formed in America which existed solely for the purpose of intercepting some of the English company's profits and withdrawing them from the liability to pay income tax here. Sir John says that he regarded such a proceeding as a dishonest device, and, thinking it would very likely fail in its object, he set about calculating the possible claim against the company for unpaid income tax which might thereafter arise. But even then it never occurred to him to ask to see the returns made for the purpose of getting the income

tax assessed, which might have thrown a flood of light on Holt's statements as to the profits. Well, how can I say that Sir John's attitude in these matters—an attitude of almost childlike credulity—was that of a reasonable man? His action or want of action over all these matters must go to the debit side of the account, and they far outweigh all that appears on the credit side. Unfortunately he accepted the statements of a rogue, and when he made any attempts to investigate them he allowed himself to be put off by these miserably unsatisfactory excuses. No one knows better than men engaged in such enterprises as Holt had undertaken here that the plummet which will fathom the depth of human credulity has not yet been discovered, and he made full use of that knowledge with each and all of these unfortunate gentlemen. I am quite satisfied that Sir John had no reasonable ground for entertaining the belief which he did; and I must hold him equally with his co-defendants liable to compensate the plaintiff.

Two questions arise as to the question of the relief. [His Lordship dismissed the evidence as to the allotment of shares to the plaintiff and held that the number of shares in respect of which he was entitled to recover was 300.]

Then how much? The amount paid for the shares was 300*l*. They are absolutely valueless now; but the difference between the amount paid and their present value is not the measure of damages. The true measure is the difference between the amount paid and the value of the shares at the date of the allotment; the date of the allotment here was July 2, 1913. This company had no right to go to allotment. The minimum number of shares upon which allotment was to be made had not been subscribed by many thousands; and the result of its going to allotment—a result which unfortunately cannot be undone, though I should hope that even now some means may be found of bringing to book those officials on whose utterly false statutory declarations the returns were filed—was that the company had some 4000*l*. or 5000*l*. with which to discharge an immediate liability of 25,000*l*. and to meet preliminary expenses of formation, estimated at a sum not exceeding 3000*l*. Moreover, it was at the date of allotment for all practical purposes in the

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hands of an unscrupulous man, ready, as I believe, throughout and intending to appropriate to himself the whole of its liquid assets, or so much of them as he could do. What, if I were a jury, should I estimate to be the value of shares in such a concern, managed, as I say, by an individual of that character? The answer is inevitable. I believe the shares were absolutely valueless, and accordingly the plaintiff is, in my opinion, entitled to judgment for the full amount paid on the 300 shares, with interest at 5 per cent. down to judgment, and the costs of the action.

Solicitors: *Munns & Longden; Dollman & Pritchard; A. H. L. Knapp; White & Co.*

G. M.

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—

*In re* GROOS.  
GROOS v. GROOS.

[1914 G. 2204.]

*Conflict of Laws — Will — Personal Estate — Law of Holland restricting testamentary Capacity — Subsequent Acquisition of English Domicil giving enlarged testamentary Capacity — Effect on former Will.*

Testatrix, by her will made in the Dutch language and duly executed according to the law of Holland, appointed her intended husband as heir of her estate, "with reservation only of the legitimate portion or the lawful share coming to her relations in a direct line in so far as they may exist at her death and may be competent and able to inherit from her." At the date of her will both the testatrix and her intended husband were of Dutch nationality and domiciled in Holland. After their marriage (which under the law of Holland did not revoke the previous will) they acquired an English domicil, the husband becoming a naturalized British subject. The testatrix died in 1903 possessed of personal estate only and leaving her husband and five children her surviving. According to the law of Holland three-fourths of her estate would, under the circumstances, have been distributable amongst her children as their legitimate portion and one-fourth only have been disposed of by the will in favour of her husband:—

*Held*, that, the testamentary capacity of the testatrix at the date of her death having been enlarged by her acquisition of an English domicil, her husband became entitled under the will to the whole of her estate.

*In re Bridger* [1894] 1 Ch. 297 followed and applied.

ADJOURNED SUMMONS.

On November 12, 1868, a marriage contract was made between Carl Wilhelm Groos and Jeanne Theodora Kol, both Dutch

subjects domiciled in Holland, providing that there should be no community of property or profit and loss between them, and reserving to the parties the right to dispose of their effects by will with the exception of certain specific articles which were made over as a gift to such one as might survive the other.

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By her will, made in the Dutch language and duly executed at Utrecht on November 12, 1868, before a notary and two witnesses, in accordance with the law of Holland, Jeanne Theodora Kol confirmed the gift of chattels made to Carl Wilhelm Groos, her intended husband, by virtue of the said marriage contract, and appointed as heir of her estate her before mentioned intended husband, "with reservation only of the legitimate portion or the lawful share coming to her relatives in a direct line in so far as they may exist at her death and may be competent and able to inherit from her"; and in the event of her aforesaid intended husband not being the sole heir of her estate she appointed him executor of her last will with the right of possession of all her effects, movable and immovable, forming her estate during one year after her decease.

On November 19, 1868, Jeanne Theodora Kol intermarried at Utrecht with the said Carl Wilhelm Groos, who was then a Dutch subject but resided in England for the purposes of his business. According to the law of Holland the testatrix's will was not revoked by her subsequent marriage.

After the date of the marriage the testatrix resided in England with her husband, and in 1889 her husband became naturalized in this country and thenceforth remained domiciled with the testatrix in England as a British subject.

The testatrix died on November 7, 1903, without having altered her will, leaving her husband and five children her surviving. Her estate consisted entirely of personal property.

On May 26, 1904, probate of a translated notarial or office copy of the will was granted out of the Principal Registry to the husband, limited, however, to the period of one year from the date of the testatrix's death. (1)

The husband died on January 30, 1914, without having completed the distribution of the estate of the testatrix, and letters of

(1) See *In the Estate of Groos* [1904] P. 269.



SARGANT J. administration to the estate of the testatrix cum testamento annexo had been granted to the plaintiff, who now took out this originating summons for the determination of the question who were the persons entitled to share in the estate of the testatrix and in what shares and proportions.

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Evidence of the law of Holland was given by a Doctor of Laws of the University of Leiden, who was also a member of the Amsterdam Bar, who stated in his affidavit (*inter alia*) as follows :

4. "Under the laws and constitution of the kingdom of the Netherlands the said Jeanne Theodora Groos, being at the date of her will an unmarried woman of the age of twenty-six years, had power to make the said will, and the said will was made in conformity with and is valid by the laws and constitution aforesaid, and was not under such laws and constitution revoked by the testatrix's subsequent marriage."

5. "Under the laws and constitution of the said kingdom of the Netherlands upon the death of any person certain of his or her relations by blood in the ascending or descending line are entitled to a share of the estate of the deceased notwithstanding anything contained in the will of the deceased. This is called 'the legitimate portion' (*portio legitima*), and is that to which the testatrix refers in her will in her reservation of the legitimate portion or the lawful share coming to her relatives in a direct line in so far as they might exist at her death and might be competent and able to inherit from her. The wording of this provision is in accordance with the form almost invariably used by Dutch subjects in wills made by them. All dispositions of her estate made by the deceased either by way of gift in her lifetime or by will beyond such part as is left after the deduction of such legitimate portion are null and void."

6. "Under the laws and constitution of the said kingdom of the Netherlands, upon the death of a married woman having excluded by marriage articles every community of property and of profit and loss between her and her husband and leaving a husband and three or more children her surviving, these children as next of kin take the whole estate if the deceased dies intestate. In case the deceased leaves a will the legitimate portion which must be left to the children consists of the sum total of three-

fourths of such portions as each child would have taken if the deceased had died intestate, and accordingly such children, to the exclusion of any relations in the ascending line, are entitled to take in equal shares between them three-quarters of the deceased's estate as tenants in common. No part of the deceased's estate is allocated as a portion for a child who has predeceased her without leaving issue. Under the said laws and constitution of the kingdom of the Netherlands" the five surviving children "are each entitled to one fifth part of three-quarters of the estate of the testatrix."

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*A. J. Spencer* (for *F. H. L. Errington*, now serving with His Majesty's forces), for the summons.

*W. R. Bisschop*, for the children of the testatrix. The will under the circumstances only operates on that portion of her estate which by the law of Holland the testatrix could leave to her husband.

[SARGANT J. referred to *In re Bridger*. (1)]

In that case there was an alteration of the law between the date of the will and the date of the testator's death; and if in the present case the law of Holland had been altered I admit that the will would have taken effect subject to that alteration. But there has been no alteration of that law; the increased testamentary capacity of the testatrix at the date of her death was solely due to the change in her status through the acquisition of an English domicil, and that is not enough.

*C. E. Cree* (for *D. C. L. Cree*, now serving with His Majesty's forces), for the husband's executor. The change of domicil gave the testatrix an increased testamentary capacity at the date of her death, sweeping away the legitimate portion to which her will was subject by the law of Holland. The effect of the change of domicil is to enlarge the area of the property over which the will extends in favour of the husband. *In re Bridger* (1) is directly in point.

SARGANT J. This summons raises a curious point, but one which is I think covered by analogous decisions. [His Lordship

SARGANT J. stated the facts and read the will and continued.] The question now arises whether under the gift which I have read the husband takes the whole of the estate or only a portion of it. It seems clear that according to the law of Holland at the time when this will was executed and down to the present time a married woman, who married without any community of goods (which was the case here), was and is under the circumstances existing in the present case only entitled to dispose of one-fourth of her estate, and was and is bound by law to allow three-fourths to go to her children; and therefore there is no doubt that, if the parties had remained domiciled in Holland, the appointment by the testatrix of her husband as heir of her estate—which Mr. Bisschop conceded to amount to a residuary gift—would have operated only on one-fourth of her estate. But, though that would have been the result in the circumstances which I have supposed, in fact by the time when the testatrix died her testamentary capacity had become enlarged by her acquisition of an English domicile and she was able to dispose of the whole of her property, and the question is whether the subsequent enlargement of her testamentary capacity has had the effect of enlarging the gift to her husband. The analogous decision to which I have referred is *In re Bridger*. (1) In that case a testator by will dated June 29, 1891, bequeathed the residue of his estate to trustees in trust to pay the income thereof to his wife for her life, and after her decease in trust to pay such part of his residuary trust estate “which may by law be given for charitable purposes” to the Brompton Hospital. The testator died on February 20, 1892, and in the interval between the date of his will and the date of his death the Mortmain and Charitable Uses Act, 1891, became law, and therefore, though at the date of the will the testator was not in a position to give real estate or impure personalty for charitable purposes, he was able to do so at the date of his death. The question was whether the gift to the Brompton Hospital was enlarged so as to include property of that description, and the Court of Appeal, affirming North J., held that it was, and the judgment of Lindley L.J. is, in my opinion, conclusive of the present case. After referring to s. 9 of the Mortmain and

(1) [1894] 1 Ch. 297, 300.

Charitable Uses Act, 1891, he says: "Combining this section with s. 24 of the Wills Act, the result appears to me to be that, if a testator devises or bequeaths to a charity all the property which he can by law so devise or bequeath, the charity will take whatever property answers this description at the testator's death, and not only that which answered the description when he made his will. Such a devise or bequest would, I apprehend, clearly include property which a testator acquired a right to dispose of under a general power conferred upon him after he made his will. An extension, whether by a statute or otherwise, of a testator's power of disposition in the interval between the making of his will and of his death does not alter the meaning of his language, although such extension will necessarily enlarge the legal effect of that language by making it apply to more objects than previously it would have applied to." In the present case Mr. Bisschop conceded that though at the date of the will one-fourth only of her estate was at the disposal of the testatrix, yet, if the Dutch law had been altered so that one-half could have been left by her to her husband, the will would have operated on that one-half; but he contended that, though that would have been so if the law had been altered, it was not so if the alteration was due to a change in the status of the testatrix. That contention, however, seems to me to be disposed of by the language of Lindley L.J., whose words are: "An extension, whether by a statute or otherwise." In the present case I take the true meaning of this will to be, not a gift by the testatrix of three-fourths of her estate to her children, but a constitution of her husband as her heir or universal legatee so far as she could so constitute him, recognizing at the same time that other persons might become entitled to their legitimate portion in her estate. The legitimate portion having been swept away by reason of the change of domicil, the result is, not that the meaning of the will is in any way altered, but that the area of the property over which the will takes effect is enlarged and the whole of the testatrix's residue instead of one-fourth share only goes to the husband.

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Solicitor: *A. W. J. Groos.*

A. C.



ASTBURY J. *In re* UNITED LONDON AND SCOTTISH INSURANCE  
COMPANY.

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NEWPORT NAVIGATION COMPANY'S CLAIM.

[00205 of 1912.]

*Insurance—Marine Insurance—Fire Insurance—Ship—Policy limited to “fire only, including general average and salvage charges resulting therefrom”—Insurance Company—Winding up Order—Subsequent Fire—Total Loss—Rights of Assured—Marine Insurance Act, 1906 (6 Edw. 7, c. 41), ss. 1, 3, 65, 66—Assurance Companies Act, 1909 (9 Edw. 7, c. 49), ss. 1, 17, 28.*

A policy insuring a ship while on the Great Lakes “against the risk of fire only, including general average and salvage charges resulting therefrom,” was drawn in such a form that it was doubtful whether it was a marine policy limited to fire, or a fire policy with marine incidents contractually attached.

The ship was totally destroyed by fire a few days after the winding up of the insurance company :—

*Held*, on the construction of the policy, that it was a fire policy with marine incidents contractually attached, so that it was a fire policy within the Assurance Companies Act, 1909, and the shipowners could only prove for the unexpired portion of the premium.

*Seemle*, a marine policy limited to the risk of fire only would be a fire policy within the Assurance Companies Act, 1909, even though it were also a marine policy within the Marine Insurance Act, 1906.

SUMMONS.

By a policy of insurance, No. 48,290, dated April 11, 1912, the above company (which was registered under the Companies Acts) in consideration of 71*l.* premium insured the applicants, the Newport Navigation Company, U.S.A., for the term of twelve months from March 15, 1912, at noon to March 15, 1913, at noon (local time) against all direct loss or damage by fire, except as thereafter provided, to an amount not exceeding 2053*l.* (\$10,000) to the following described property while located and contained as described therein, and not elsewhere, to wit: “2053*l.* or \$10,000 on the hull, machinery, boilers, and everything connected therewith of the steamer *S. C. McLouth*, valued at \$30,000 as per form attached hereto which is to be taken and read as forming part of this policy. This policy covers against

the risk of fire only, including general average and salvage charges ASTBURY J. resulting therefrom."

The words after "to wit" were in writing. The following clause was in large print: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described."

A large number of clauses in small print followed.

The following yellow printed slip was attached to the policy:—

"Form 100 A. Fire policy on vessels.

"Newport Navigation Company.

"Loss if any payable to assured.

"On the steamer *S. C. McLouth* covering the hull, engines, boilers, machinery, tackle, apparel, boats, furniture, fixtures, appurtenances, equipments, stores and supplies while on board.

"This policy to cover said vessel only while on Great Lakes and waters tributary thereto.

"It is understood and agreed between the assured and this company that the value of the property insured hereunder for the purpose of this insurance is \$30,000 and this company shall not be liable for a greater proportion of any agreed amount of

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ASTBURY J. loss or damage than the amount of this policy bears to the above expressed valuation. Warranted by the assured that the total amount of insurance against fire on the property insured hereunder shall not exceed \$30,000 and permission is herewith given to carry that amount, including this policy.

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“Privilege to fit out, to do painting, to go on dry dock, to make ordinary alterations and repairs, and to lay up, to use oil or electricity for lights, and to carry such passengers freight and merchandise as it is permitted by law.

“Warranted by the assured that the vessel shall be equipped and navigated according to law, that no open lights shall be used on board except customary torches in engine and boiler rooms, signal lights and candles when trimming cargo, that coal only shall be used as fuel, except when kindling fires, without special permission from this company, and that when the vessel is laid up, it shall be moored free from specially hazardous exposure.

“Lightning Clause. This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property, this company shall be liable only pro rata with such other insurance for any direct loss by lightning, whether such other insurance be against direct loss by lightning or not.

“Dynamo Clause. This insurance shall not cover any loss or damage to dynamos, excitors, lamps, motors, switches or any other apparatus for generating utilising testing regulating or distributing electricity, caused by electric current whether artificial or natural.

“General Average and Salvage Clause. It is understood and agreed that this policy also covers salvage claims and general average charges when caused by or arising from fire and for which the vessel insured hereunder shall be legally liable.

“Port of Repair Clause. In the event of damage by fire occurring at a place where repairs cannot be made, this policy shall cover the expense of removal to a port of repair, in proportion as the

amount insured bears to the valuation expressed herein ; provided, **ASTBURY J.** however, that the cost of such removal has been approved by the representative of this company.

“ Chicago Standard Time Clause. Wherever in this policy any mention is made of any hour of the day or night, the same shall refer to Chicago (or Central) standard time.

“ Attached to and forming part of Policy No. 48,290 of the United London and Scottish Insurance Company, Limited.

“ Louis I. Jarvis,

“ General Manager.

“ All claims hereunder to be converted at \$4.87 to the £.”

On June 18, 1912, the company was ordered to be wound up on a petition presented on June 5, 1912. On June 27, 1912, the ship was totally destroyed by fire. On October 30, 1912, the applicants lodged a proof for 2053*l*. On June 11, 1914, the liquidator rejected the proof on the ground that the loss occurred after the date of the winding up order. On July 31, 1914, the applicants issued this summons for an order that the liquidator's decision be reversed and the claim allowed.

The liquidator's view was that the policy was a fire policy within the Assurance Companies Act, 1909, and he was quite willing to admit a proof for the portion of the premium unexpired at the date of the winding up.

The applicants' view was that the policy was a marine insurance policy, to which they said the Assurance Companies Act, 1909, was inapplicable.

The company did not in fact purport to carry on marine insurance, and their ordinary foreign fire policy with the yellow slip attached was used. It was headed “ New York State Standard Policy.” It bore a penny stamp only. The liquidator stated that policies of this kind were frequently issued by fire insurance companies as part of their fire insurance business.

*MacKinnon, K.C.*, and *L. F. C. Darby*, for the applicants. Unless this policy is hit by the Assurance Companies Act, 1909, the full amount is provable under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 206 : *Macfarlane's Claim*. (1)

(1) (1880) 17 Ch. D. 337.



ASTBURY J. Now this policy is obviously a marine policy. Salvage and average are meaningless except in maritime law. The yellow slip is practically the whole policy, and it prevails over the printed rules: *Cunard Steamship Co. v. Marten*. (1) A marine policy may clearly be limited to fire only, and in that case it is governed by the law of marine insurance: *Woodside v. Globe Marine Insurance Co.* (2); *Imperial Marine Insurance Co. v. Fire Insurance Corporation*. (3)

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The law of marine insurance is codified by the Marine Insurance Act, 1906, which is intituled "An Act to codify the Law relating to Marine Insurance." Sect. 1 provides that a contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, i.e., "the losses incident to marine adventure," and by s. 2 the contract may be extended to losses on inland waters. Sect. 3 provides that there is a marine adventure (inter alia) where any ship, goods, or other movables are exposed to maritime perils, which are defined as "perils of the sea, fire, &c." Under s. 4, sub-s. 2 (b), a policy "without benefit of salvage to the insurer" is void as a gaming contract. Sect. 23, sub-s. 2, provides that a marine policy must specify the subject-matter insured and the risk insured against. Sect. 30 authorizes the form of policy in Sched. I., which includes fire as a peril insured against. Sects. 65 and 66 deal with salvage and general average. Sect. 91 preserves the Stamp Act, 1891 (54 & 55 Vict. c. 39), and s. 92 repeals the Marine Insurance Act, 1745 (19 Geo. 2, c. 37), the Marine Insurance Act, 1788 (28 Geo. 3, c. 56), quoad marine insurance, and the Policies of Marine Assurance Act, 1868 (31 & 32 Vict. c. 86).

That is a complete code of marine insurance law, and it contains nothing to justify the liquidator's contention.

The stamp objection may be got rid of shortly. The Stamp Act, 1891 divides policies into "policies of sea insurance" (ss. 92 to 97) and "policies of insurance except policies of sea insurance" (ss. 98 to 100). Under s. 92 a policy of sea insurance means any insurance made upon any ship or vessel, &c., and

(1) [1902] 2 K. B. 624, 626, 627;  
[1903] 2 K. B. 511, 515.

(2) [1896] 1 Q. B. 105.  
(3) (1879) 4 C. P. D. 166.

includes any insurance of property for any transit, which includes not only a sea risk, but also any other risk incidental to the transit. Under Sched. I., the stamp on this policy as a sea policy would be 10s. 6d., but in practice the Inland Revenue accept 1d. on Lake policies: Allen on Stamp Duties on Sea Insurances, 2nd ed. pp. 45, 188, 190, 191, 203.

Up to this point the applicants have a clear case. In 1909, however, the Legislature, having three years previously successfully codified the law of marine insurance, conceived the idea of attempting to consolidate the law relating to life and other assurance companies. This was carried out by the Assurance Companies Act, 1909, which is intituled "An Act to consolidate and amend and extend to other Companies carrying on Assurance or Insurance business the Law relating to Life Assurance Companies, and for other purposes connected therewith." The Act is, however, by no means a model of lucidity, and perhaps the only thing really clear about it is that it does not and was never intended to apply to marine insurance.

Sect. 1 provides that the Act shall apply to all persons or bodies of persons, corporate or unincorporate, except registered friendly societies and trade unions (which persons and bodies of persons are thereafter referred to as assurance companies), who carry on within the United Kingdom assurance business of all or any of the following classes:—(a) Life assurance business; (b) fire insurance business—that is to say, the issue of, or the undertaking of liability under, policies of insurance against loss by or incidental to fire; (c) accident insurance business; (d) employers' liability insurance business; (e) bond investment business. A company registered under the Companies Acts which transacts assurance business of any such class as aforesaid in any part of the world shall for the purposes of this provision be deemed to be a company transacting such business within the United Kingdom.

Now s. 1 does not include marine insurance business any more than the Life Assurance Companies Acts, 1870 to 1872, and other Acts, repealed by s. 37, included marine insurance.

Sect. 17, sub-s. 1, and Sched. VI. obviously refer to the valuation of policies of the classes mentioned in the Act, and not to marine

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ASTBURY J. policies. Moreover, s. 28, sub-s. 3, provides that nothing in the Act shall apply to assurance business of any class other than one of the classes specified in s. 1, "and a policy shall not be deemed to be a policy of fire insurance by reason only that loss by fire is one of the various risks covered by the policy." The last clause probably applies to combination policies such as fire and burglary, but it has no reference to marine policies, which are altogether outside the Act. In other words, a marine policy limited to fire is not brought within s. 1 by a sort of negative pregnant based on these words of exception.

Again, s. 28, sub-s. 2, provides that the Act shall not apply to a member of Lloyd's, or of any other association of underwriters approved by the Board of Trade, who carries on assurance business of any class provided that he complies with the requirements of Sched. VIII. applicable to business of that class.

Now Sched. VIII. division (B) and (C), "As respects Fire and Accident Insurance Business," gives the underwriter two alternatives. Clause 2 provides that he may comply (inter alia) with the undermentioned conditions:—

(b) He shall furnish security to meet claims under policies issued by him in connection with fire and accident business "and any other non-marine business." The amount of the security shall never be less than the aggregate of the premiums receivable in the last preceding year in connection with such fire and accident "and other non-marine business."

(d) For the purposes of these requirements "non-marine insurance business" means the business of issuing policies upon subject-matters of insurance other than the following, namely:—  
"Vessels of any description, including barges and dredgers, cargoes, freights, and other interests which may be legally insured by, in, or in relation to vessels, cargoes, and freights, goods, wares, merchandise, and property of whatever description insured for any transit by land or water, or both, and whether or not including warehouse risks or similar risks in addition or as incidental to such transit."

It was not necessary to mention marine insurance in the Act itself because it only applies to assurance companies carrying on the businesses specified in s. 1. But in the case of members of

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Lloyd's, who are well known to carry on every kind of insurance, some special provision was necessary. Sched. VIII., which is part of the Act, makes it perfectly clear that for the purposes of the Act all fire business is non-marine and no insurance on a ship is non-marine. Therefore no insurance on a ship is fire business within the Act.

*Leslie Scott, K.C.*, and *H. E. Wright*, for the liquidator. *Macfarlane's Claim* (1), though binding in this Court, was in fact wrongly decided, and the liquidator will so contend if the case goes higher.

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Of course a marine policy may be limited to fire only. But this is not a marine policy at all. It is a fire policy pure and simple, with marine incidents attached by special contract, because the subject-matter happens to be a ship. Salvage and average would be implied in a marine policy, both at common law and under the Marine Insurance Act, 1906, ss. 65, 66. In the present case they have to be specially contracted for. Of course they are only intelligible in maritime law, but they are not perils. They are expenses or damages incurred in averting the peril insured against, e.g., payment for assistance would be salvage, and damage to sound cargo by water employed to quench fire would be general average: *Whitecross Wire and Iron Co. v. Savill*. (2)

Again, abandonment is a usual incident of marine insurance, and as this was a fire policy on a ship the applicants might possibly have claimed a right to abandon. This is, however, expressly negatived to prevent any such question arising. In a marine policy it would not have been negatived. This policy is therefore a fire policy and the Assurance Companies Act, 1909, applies.

Suppose, however, it is also a marine policy. That does not prevent it being a fire policy within the Act. The Act approaches the question from the point of view of the character of the insurance company, and not the subject-matter of the insurance. An ordinary marine policy including fire as one of the risks would be a fire policy within s. 1 (b). But it would be excluded by s. 28, sub-s. 3. This exclusion does

(1) 17 Ch. D. 337.

(2) (1882) 8 Q. B. D. 653.



ASTBURY J. not, however, apply to a policy where fire is the only risk covered.

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It was probably considered expedient to exclude ordinary marine policies, but not those limited to fire only.

Sect. 28, sub-s. 2, gives members of Lloyd's special privileges if they comply with the requirements of Sched. VIII. Sched. VIII. is no doubt part of the Act, but it is solely confined to members of Lloyd's and is no guide to the general construction of the Act.

The applicants' case is based on the proposition that marine insurance and fire insurance are mutually exclusive. That is a fallacy. A policy may be both: *Grant v. Aetna Insurance Co.* (1); *Pearson v. Commercial Union Assurance Co.* (2)

*MacKinnon, K.C.*, in reply. It is obvious that fire is the peril insured against. But the question is whether that peril is incident to a marine adventure. If so the policy is a marine policy.

[ASTBURY J. You treat marine and fire insurance as mutually exclusive.]

Clearly. So, with submission, do the Legislature, the common law, and the custom of merchants. The Assurance Companies Act, 1909, is really limited to the businesses specified in s. 1: *In re Law Car and General Insurance Corporation.* (3)

*Cur. adv. vult.*

Feb. 23. ASTBURY J. This is an application by the Newport Navigation Company, U. S. A., that a decision of the liquidator in the winding up of the United London and Scottish Insurance Company rejecting the applicants' proof of 2053*l.* on a policy of insurance may be reversed.

On April 11, 1912, the applicants insured with the company the steamship *S. C. McLouth* against loss or damage by fire, while on the Great Lakes of America, for 2053*l.* upon the terms of a policy to which I will refer in a moment.

The insurance company was ordered to be wound up on June 18, 1912, and nine days later the vessel was totally destroyed by fire. The applicants claim to prove in the winding

(1) (1862) 15 Moo. P. C. 516.

(1876) 1 App. Cas. 498.

(2) (1873) L. R. 8 C. P. 548;

(3) [1913] 2 Ch. 103, 129.

up for total loss. The liquidator has rejected that proof, and this summons has been issued to review his decision.

The insurance company did not purport to carry on or transact the business of marine insurance, and the policy, in the present case, is in the form used by the company in its fire insurance business, with a yellow printed slip attached.

The material portions of the policy and slip are as follows. The company insured is the Newport Navigation Company, U. S. A., and it is insured against all direct loss or damage by fire except as thereafter provided to an amount not exceeding 2053*l.* on the hull, machinery, boilers, and everything connected therewith of the steamer *S. C. McLouth* as per form attached thereto, which is to be taken and read as forming part of the policy, and the policy covers against the risk of fire only, including general average and salvage charges resulting therefrom. The yellow slip attached to the policy is headed "Fire Policy on Vessels." It provides that the policy is to cover the vessel while on the Great Lakes, and that the policy also covers salvage claims and general average charges when caused by or arising from fire and for which the vessel insured thereunder shall be legally liable, and in the event of damage by fire occurring at a place where repairs cannot be made the policy is to cover the expense of removal to a port of repair as therein provided.

Nothing turns in this case upon the inconsistency, if any, between the printed conditions of the policy and the contents of the attached slip, the latter clearly prevailing: *Cunard Steamship Co. v. Marten*. (1)

Sect. 206 of the Companies (Consolidation) Act provides for the proof of contingent claims in winding up.

In *Macfarlane's Claim* (2) Macfarlane held a policy of fire insurance of the Northern Counties of England Fire Insurance Company for a sum of 500*l.* upon certain buildings. On November 26, 1879, a winding up petition was presented and on December 13, 1879, a winding up order was made. On January 22, 1880, i.e. after the winding up order, the insured premises were burnt down, and Macfarlane thereby suffered loss to the full amount of the policy. It was held that he was

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(1) [1902] 2 K. B. 624, 626, 627.

(2) 17 Ch. D. 337.

ASTBURY J. entitled to prove in the winding up for the full amount of loss covered by the policy and sustained by him through the fire notwithstanding the fact that it occurred after the date of the winding up order.

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If the matter rested here, the applicants would, in this Court at all events, be entitled to succeed; but the question I have to decide depends upon whether the provisions of the Assurance Companies Act, 1909, apply to the present case.

Sect. 1 provides that the Act shall apply to all assurance companies carrying on assurance business of all or any of the following classes within the United Kingdom. Then five classes are specified, one of which is: (b) "Fire insurance business; that is to say, the issue of, or the undertaking of liability under, policies of insurance against loss by or incidental to fire."

Sect. 17, sub-s. 1, provides that "Where an assurance company is being wound up by the Court, or subject to the supervision of the Court, or voluntarily, the value of a policy of any class or of a liability under such a policy requiring to be valued in such winding up shall be estimated in manner applicable to policies and liabilities of that class provided by the Sixth Schedule to this Act."

Sched. VI. (B), headed "As respects Fire Policies. Rule for valuing a Policy" provides that "The value of a current policy shall be such portion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which the premium was paid."

Sect. 28, sub-s. 3, provides that "Save as otherwise expressly provided by this Act, nothing in this Act shall apply to assurance business of any class other than one of the classes specified in section one of this Act, and a policy shall not be deemed to be a policy of fire insurance by reason only that loss by fire is one of the various risks covered by the policy." Under this sub-section it is clear that ordinary marine insurance, though not referred to as such, is excluded.

Sect. 28, sub-s. 2, provides that "This Act shall not apply to a member of Lloyd's, or of any other association of underwriters approved by the Board of Trade, who carries on assurance

business of any class, provided that he complies with the requirements set forth in the Eighth Schedule to this Act, and applicable to business of that class." Under Sched. VIII. there are special provisions relating only to Lloyd's, one being that "non-marine insurance business" does not include any insurance upon "vessels of any description, including barges and dredgers." But the term "non-marine insurance business" does not appear in the Act itself, and the special terms provided in the case of Lloyd's do not, in my opinion, assist in the construction of the main provisions of the Act in this respect.

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The Marine Insurance Act, 1906, s. 1, declares that "A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure." Sect. 3, sub-s. 1, provides that "Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance." Sub-s. 2 provides that "In particular there is a marine adventure where—(a) Any ship goods or other moveables are exposed to maritime perils." "Maritime perils" are defined as meaning "the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy." Sects. 65 and 66 deal with salvage charges and general average loss.

It is not disputed that all marine perils except one may be struck out of the usual form of a marine policy, and the same still remain a "marine policy" within the meaning of this statute: see *Woodside v. Globe Marine Insurance Co.* (1)

The present policy is stamped with a penny stamp only, whereas a marine policy, covering a period of time, requires a stamp of a higher value. The practice under and the interpretation of s. 92 of the Stamp Act, 1891, have been by no means uniform, but the Board of Inland Revenue in 1884 took the view that policies on vessels on rivers, lakes, canals, and other

(1) [1896] 1 Q. B. 105.



ASTBURY J. inland waters were chargeable with a stamp duty of a penny only.

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This matter has been referred to in argument, but is not, in my judgment, very relevant to the decision of the present dispute.

The question I have to determine is whether, although this is a ship insurance, it is an insurance against loss by or incidental to fire within the meaning of the Assurance Companies Act, 1909, in which case the proof must be limited to the amount ascertainable in accordance with Sched. VI., which is the liquidator's view; or whether, on the other hand, it is such a marine insurance as is excluded from the operation of the Act by s. 28, sub-s. 3.

The applicants contend, first, that all ship insurances covering transit, even if limited to fire risks, are so excluded, and, secondly, that this is especially the case where the policy covers salvage claims and general average charges, although limited to those caused by or arising from fire, which they truly say are incidents of "marine" as distinct from "fire" insurance in the ordinary acceptance of those terms.

The Assurance Companies Act, 1909, raises, no doubt, many difficulties in its application to particular cases, but I cannot think that the mere fact that an insurance is or may be a marine insurance within the definition of the Marine Insurance Act, 1906, determines the question at issue in this case. If an ordinary marine insurance form were adopted with all the usual marine risks, except fire, excluded, I see no reason for holding that this would not be an insurance against loss by or incidental to fire or that it would be excluded from the operation of the Assurance Companies Act, 1909, by s. 28, sub-s. 3, which certainly does not provide that a policy shall not be deemed to be a policy of fire insurance if loss by fire is the only risk covered by it; nor does it exclude policies by reference to the "subject-matter" of the insurance, but only by reference to the nature of the risk. Sect. 28, sub-s. 3, was required, *inter alia*, to exclude general marine policies. Otherwise they might have been included in or have been construed as "fire policies" under s. 1 (b). But s. 28, sub-s. 3, does not in my opinion directly or by inference exclude marine policies limited to fire risks as defined by s. 1 (b).

Further, the evidence and the authorities appear to show that ordinary fire insurances of ships are not uncommon or unknown.

The remaining point to be considered is, whether the fact that the policy covers salvage claims and general average charges, when caused by or arising from fire, is sufficient to exclude the operation of the Assurance Companies Act, 1909. In my opinion it is not. The only risk insured against is loss by or incidental to fire, but, the subject-matter of the insurance being a vessel, the assured is contractually covered for special claims and charges caused by or arising from the occurrence of the risk or event insured against, which would not otherwise form part of the loss covered by the policy.

One reason for excluding general marine insurance from the Act of 1909 may well be that in case of vessels at sea and goods carried by them notice of the winding up of the insurance company if it occurs may not be obtained in time to effect a re-insurance, and notice cannot be given to the company of the occurrence of many of the events insured against within any limited or specified time as is usually provided for in fire policies; but if the policy in question is in fact a fire policy and that only, as in this case I think it is, the mere fact that the subject-matter is a ship, and subject to inconveniences accordingly, does not, in my judgment, bring it within any of the exceptions in the Act of 1909.

For these reasons the application, in my opinion, fails, and must be dismissed.

Solicitors: *Parker, Garrett & Co.; Wrensted, Hind & Roberts.*

G. R. A.

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[1912 S. 523.]

*Will—Specific Gift of Chattels in France—“Free of legacy duty”—French Mutation Duty—Penalties for Delay in Payment—Incidence of Duty and Penalties.*

Testator, a domiciled Englishman, by his will bequeathed to Lady S. “free of legacy duty” all his pictures, engravings, furniture, busts, silver plate, and “works of art” of every description wheresoever situate, except at his two London houses or except those bequeathed specifically by his will. At his death he was possessed of a number of valuable tapestries which were attached to the walls of his house in Paris, which the Court held, upon the facts, passed to Lady S. under the specific bequest of “works of art.” According to French law a mutation duty was payable by the legatee on these chattels; and if the duty was not paid within eight months of the testator’s death certain penalties were incurred. By reason of litigation which arose with reference to the proving of the will and the administration of the estate the French duty was not paid, and Lady S. was not put into possession of the tapestries until two years after the testator’s death and heavy penalties for delay became payable to the French fiscal authorities:—

*Held*, (1.) on the construction of the will, that the expression “legacy duty” was used by the testator in its strict legal sense as meaning the duty imposed by the Legacy Duty Act, 1796, and amending Acts, and not as meaning all duties in the nature of legacy duty, and that it did not therefore include the French mutation duty; (2.) that there was no obligation on the executors to pay the mutation duty in order to get possession of the tapestries and deliver them to the legatee, and consequently that the mutation duty must be borne by the legatee; (3.) that the penalties were in substance an extra mutation duty and must also be paid by the legatee.

Decision of Warrington J. [1914] 1 Ch. 847 affirmed.

*Peter v. Stirling* (1878) 10 Ch. D. 279 distinguished.

APPEAL from two decisions of Warrington J.—one of which is reported (1)—raising the question whether the specific legatee of certain chattels situated in Paris at the time of the testator’s death, under a gift free of “legacy duty,” was entitled to have discharged out of the residuary estate (1.) a duty which was imposed upon the property in France and known as “droits

(1) [1914] 1 Ch. 847.

de mutation par décès," and (2.) certain penalties which were imposed by the French fiscal authorities for delay in payment of the mutation duty.

Sir John Edward Arthur Murray Scott, Bart., by his will, dated October 26, 1900, after appointing executors and trustees thereof and making various bequests (including a gift to the National Gallery of certain paintings which were then in his house, No. 2 Rue Lafitte, Paris), made (inter alia) the following bequest:—"I bequeath to Victoria Sackville-West"—now Lady Sackville—"the wife of Lionel Edward Sackville-West of Knole Sevenoaks Kent free of legacy duty and for her sole and separate use as souvenir of a sincere friendship my Marie Antoinette pocket-book." Then after other specific gifts the will continued: "I also bequeath to the said Victoria Sackville-West for her sole and separate use and free of legacy duty all my pictures engravings furniture busts silver plate and works of art of every description wheresoever situate except at 5 Connaught Place and 8 Chandos Street London or wherever may be situate my London house or except those bequeathed specifically by this my will or any codicil thereto and further the sum of 150,000*l*." Then after making other bequests the testator declared "that all the foregoing bequests shall be free of legacy duty." The testator devised and bequeathed his residuary real and personal estate upon certain trusts for his brothers and sisters and their issue. The testator made five codicils to his will. The first four need not be stated; the fifth contained the following provision: "And in case I shall in my lifetime have made any dispositions purporting to operate as immediate gifts inter vivos and by reason of the Finance Act, 1910, or any statutory modification thereof any death duties shall become payable on my death in respect thereof then I hereby direct that such duties shall be payable by my executors out of my general personal estate."

The testator died on January 17, 1912, domiciled in England. At his death he was possessed of a number of valuable tapestries which were attached to the walls of his house in Rue Lafitte, Paris.

After his death his will was contested by the residuary legatees and considerable litigation took place with reference to it.

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Proceedings were instituted in the Probate Court to set aside the will. On February 12, 1912, an administration action was commenced and a receiver was appointed pending the proceedings in the Probate Court. On July 7, 1913, judgment was given by the Probate Court pronouncing for the will, which was duly proved on July 30, 1913.

On November 24, 1913, a summons was taken out by some of the residuary legatees, one of whom was also an executor of the will, for the determination (*inter alia*) of the questions (1.) whether these tapestries passed to Lady Sackville under the above bequest as "works of art"; and (2.) if they did, who was liable to pay (*a*) the French mutation duty in respect of them, and (*b*) the penalties (if any) payable in France in respect of such duty.

As to the first question Warrington J. held that the tapestries were works of art and not part of the house, and that not being within the excepted places they passed under the specific bequest to Lady Sackville.

The question as to the payment of the French mutation duty came before Warrington J. on February 24 and 25, 1914. See [1914] 1 Ch. 847.

Affidavits by two French advocates, M. Gabriel Astoul and M. Henri Mesnil, were filed on behalf of the specific legatee. M. Astoul deposed as follows:

Par. 4. "There is only one death duty in France namely: 'droits de mutation par décès' which is a duty payable on transmission of property on death."

Par. 5. "This French duty is one which has been payable in France for more than 100 years (having been created in 1798 by a law known as the Law of the 22nd Frimaire year 7), but the rates at which it is payable have from time to time been altered by what I may call Finance Laws which correspond with English Acts of Parliament dealing with similar matters and the last of which containing such an amendment was made in the year 1910. The duties are payable on different scales."

Par. 6. "In France all estates as far as property locally situate there is concerned are liable to the duty irrespective of the nationality or domicile of the deceased, but the domicile of

the deceased is an important factor for the purpose of determining what property other than that so locally situate may be liable to duty."

Par. 7. "In France executors are ignored and the beneficiary is the person liable for the duty and to whom the authorities look for payment thereof. In the case of an English testator however the practice is, having regard to the particular status of executors according to English law, to allow the executors to make the required declaration and pay the duty, but notwithstanding this they are not considered liable and consequently no step could be taken against them to enforce payment if they did not offer to make it."

Par. 8. "The French authorities are entitled to pursue (in personam) the person responsible for the duty and after obtaining a judgment to levy execution out of the specific legacy and out of any other property of the person so responsible. They have also power to issue a sort of writ called 'contrainte' upon which execution can be levied as upon a judgment, but in such a case the party liable has a right to appeal to the Court. They are further entitled in aid of their rights under such a judgment or writ to a first charge on the income (but not on the capital) of the property so specifically given, but if the legatee has other creditors the authorities are only entitled rateably with them to resort to the capital of the specifically bequeathed property and would have no claim for such duty against other property forming part of the deceased's estate passing to other persons."

Par. 9. "In the case of a testator dying in France the duty is payable within six months from the death. In the case of a testator dying in England the duty is payable within eight months."

Par. 10. "Penalties are payable under the French law if the duty is not paid within the prescribed time."

Par. 11. "Under the French Finance Law of the year 1910 penalties are payable at the rates mentioned in par. 9 of the said affidavit, but such penalties are never to exceed in the aggregate one half of the original duty. The authorities may at their discretion and frequently do on sufficient cause being shown to their satisfaction remit part of the penalties which have been incurred."

M. Mesnil in his affidavit said: "I have read a copy of the

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affidavit sworn in this action by M. Gabriel Astoul on the 2nd December, 1913. I agree with the statements therein contained as to the history nature and incidents of the French death duty known as *droit de mutation par décès*, and I agree that such death duty is the only death duty payable in France. The only person directly liable to the fiscal authorities for the amount of the duty in the case of a legacy is the legatee himself and as between the legatee and the fiscal authorities that position is not altered by a provision in the will under which the legacy is to be paid free of the duty. In my opinion the French death duty on a legacy is closely analogous to the English legacy duty in that it operates as a deduction from the amount of the legacy and varies in amount according to the degree or (as the case may be) the absence of relationship between the testator and the legatee, though it also varies according to the amount or value of the legacy. If therefore, according to the construction given by an English Court to an English will, the words 'free of legacy duty' mean free of all duty to be paid by a legatee in respect of his legacy the French duty must in my opinion be paid by the executors of such will and not by the legatee."

Warrington J. held, on the construction of the will, that the expression "legacy duty" was used by the testator in its strict legal sense as meaning the duty imposed by the Legacy Duty Act, 1796, and amending Acts, and not as meaning all duties in the nature of legacy duty, and that it did not therefore include the French mutation duty.

He further held that, the mutation duty being a debt due by the legatee, the legatee in order to succeed must show that the will imposed upon the executors an obligation of paying a debt of the legatee, and this had not been done. He held, therefore, that the mutation duty was payable by the legatee.

The further question upon the summons arose in this way.

By the French law the mutation duty has to be paid, in the case of a person dying abroad, within eight months, and if not paid within that time the French fiscal authorities are entitled to demand a penalty, the amount of which varies according to the time which elapses before payment in addition to those eight months.

In the present case, by reason of the litigation that arose upon the testator's will, Lady Sackville was not put into possession of the chattels in question till about two years after his death, and as a result further sums amounting to about 37,000*l.* became payable to the French Government by way of penalties.

The facts as to this point are more fully stated in the following judgment which was delivered on October 20, 1914.

WARRINGTON J. The question which I have now to determine is whether Lady Sackville, as the specific legatee of certain chattels belonging to the testator which at the time of his death were in France, is or is not liable to pay the penalties payable in France in respect of the mutation duty by reason of the fact that the mutation duty was not paid within eight months after the testator's death.

The facts of the case are very short. The testator died on January 17, 1912. By his will he bequeathed certain valuable chattels, which at his death were situated in France, to Lady Sackville. The will was disputed by some of the next of kin, and in February, 1912, pending the settlement of the dispute as to the will, a receiver was appointed, whose office extended to the whole estate of the testator, including these French chattels. Probate proceedings were commenced, and in July, 1913, a judgment was delivered in the Probate Division establishing the will. There arose a question on the construction of the will under the circumstances which had happened, whether certain articles consisting of some valuable tapestries formed part of the specific bequest, and in February, 1914, it was decided by this Court that these chattels did form part of the bequest. By the joint operation of that order and the judgment of the Probate Division the validity of the legacy and the constituent items of the legacy were finally ascertained, and in June of this year the executors under the direction of the Court finally assented to the legacy and possession was given to the legatee. So that this is the legatee's point, as will be seen presently, that from the death of the testator until June of this year she had not actual physical possession of the subject of the legacy, nor had the executors formally assented to it.

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Now comes the question I have to determine. The French law imposes a duty under such circumstances which is called mutation duty ; it is something like our legacy duty, although it is not exactly the same thing. The effect of the French law is this, that the duty is not due from the executors at all ; the executor is not recognized in France ; it is a duty due from the legatee, the person who by reason of the mutation of ownership becomes entitled to chattels which had previously belonged to somebody else. In addition to the actual duty the French fiscal authorities are entitled to demand a penalty if the duty is not paid within a prescribed time. The prescribed time in the case of a person dying abroad is eight months, and the amount of the penalties varies according to the time which elapses in addition to that eight months, that is to say, it is 1 per cent. for the first month and so much per cent. for every month after and so on.

The Court has already held that according to the true construction of the testator's will the legatee is not entitled to call upon the executors to pay the mutation duty. The mutation duty is a duty due from her and she must pay it to the fiscal authority, and she has, according to the decision to which I have referred, no right to recover repayment from the executors. But she says, "So far as penalties are concerned I am in a different position." Now, is that so ? The penalty is not strictly interest on the duty ; it seems to me, according to the statement by M. Astoul, the French lawyer, who refers to these penalties, that the penalties really are an additional sum calculated so to speak by way of percentage on the amount of the duty, but it is really an additional duty which the French fiscal authorities are entitled to demand if the mutation duty is not paid at the proper time. As a matter of fact the fiscal authorities in the particular case have taken into consideration the circumstances which have happened and I suppose, amongst other things, the fact that the legatee has not been in possession of the subject of her legacy owing to the proceedings which I have mentioned. They have taken those circumstances into account and they have remitted eight-tenths of the penalty, leaving only two-tenths or one-fifth payable by the legatee. Is the legatee entitled to recover whatever she pays, that one-fifth or any part of it, from the executors ?

It seems to me that she is not. That is a sum due from the legatee to the French authorities, and it is for her to show that by reason of some transaction the executors have become bound to indemnify her against it. It seems to me that there is no foundation for that. It is quite true that she was not placed in possession of her legacy, but the reason for that was a proper reason; she has not been in any way wrongly kept out of her legacy, the executors have committed no wrong against her, and nothing, therefore, seems to me to give rise to any claim for an indemnity. It seems to me that this penalty is as much the mutation duty as the original mutation duty to which my decision of February of this year applied, and that the legatee has no right to recover the penalty any more than she has a right to recover the mutation duty.

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Against the decisions upon questions 2 (a) and (b) arising upon the summons Lady Sackville now appealed.

The two appeals were heard together on February 10 and 11, 1915.

*Younger, K.C., Maugham, K.C., and Dighton Pollock*, for the appellant. It is common ground that the testator was well aware that French duty would be payable on the chattels in question. The question is what is meant by the phrase "free of legacy duty" in the will. It is submitted that it means that the legatee is to be exempt from all duty payable in respect of the legacy. The gift "free of duty" is an additional legacy of a sum equivalent to the amount of the duty. Where a testator gives a legacy free of duty he intends that the legatee shall take it without having to pay any duty in respect of it. There are bequests by the will free of legacy duty which are not chargeable with duty until sale (see Finance (1909-10) Act, 1910, s. 63), e.g., the bequest to the National Gallery. The object of the testator in providing that they should be free of duty was, it is submitted, to exempt them from the French duties. It cannot be that the testator, when he was giving these pictures to the National Gallery, supposed that he was giving them subject to the term that the trustees should pay a duty amounting to 20 per cent. of their value.

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Upon the question of construction, therefore, it is submitted that the testator intended that the legatees should take the specific legacies free from any impost in the nature of legacy duty: *In re Johnston* (1); *In re Leveridge*. (2)

"Legacy duty" has no statutory defined meaning. It would be whimsical to say that the testator intended to limit the exemption to English legacy duty.

There is another ground on which it is submitted the appellant is exempted from payment of these French duties. This is a specific legacy, and it is the duty of the executors to deliver it to the legatee in England. If in order to obtain possession of the specific chattel the executors have to pay money, the money so paid must be borne by the residuary estate: *Perry v. Meddowcroft* (3); *Cockerell v. Barber* (4); *In re De Sommetry*. (5)

The point is thus put by Mr. Pearson in the argument which succeeded in *Peter v. Stirling* (6): "By English law a testator's personalty is considered situated where he is domiciled, and it is the business of the executors to realize all property out of England, to have the proceeds remitted to England, and to distribute the whole estate here as one fund. All costs of so doing are expenses of administration which properly fall on the residue. The legatees living here can no more be required to contribute to payment of taxes and costs required to be paid in another country in order to recover and get in the testator's estate there, than they can be required to contribute to the expense of remitting home the proceeds, or to the payment of fees, stamp duties, or commissions, on realizing the testator's property. All the assets should be brought to England for administration here, and when so brought are liable to pay the legacies without any deduction except English duty." We desire to adopt that argument in this case.

*Peter v. Stirling* (6) was followed by North J. in *In re Maurice* (7), and has never been dissented from. The law is thus stated in Westlake on Private International Law, 4th ed. p. 138:

(1) (1884) 26 Ch. D. 538.

(2) [1901] 2 Ch. 830.

(3) (1841) 4 Beav. 197, 204.

(4) (1810) 16 Ves. 461.

(5) [1912] 2 Ch. 622.

(6) 10 Ch. D. 279, 282.

(7) (1896) 75 L. T. 415.

"Any duty which must be paid abroad on the assets of a person whose last domicile was in England must be deemed to be paid out of his residue, so that his particular legatees will not have to contribute to it, notwithstanding that they would have to do so by the law of the country where the duty is imposed." See also pp. 152 and 157.

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It is the duty of executors to get in all the testator's estate, whether specifically bequeathed or otherwise, and there is no instance in which the expenses of such getting in have not been paid out of the general estate as part of the expenses of the administration.

The gift by the testator to the National Gallery affords a clear illustration of the principle which governs this point. The testator gives the pictures which he states are in his house in Paris. It cannot be seriously suggested that the executors can assent to the legacy and tell the trustees of the National Gallery to go to Paris and get the pictures. It is clearly the duty of the executors to deliver them to the National Gallery in Trafalgar Square. Where there is a gift of a chattel which is pledged the legatee is entitled to have the chattel redeemed out of the general estate: *Bothamley v. Sherson*.<sup>(1)</sup> So, if property in the hands of a wharfinger be given, the claim of the wharfinger must be discharged by the executor.

Then the third question is whether, assuming Lady Sackville is liable for the duty, she is liable also for the penalties.

By the French law the duty and the penalties are thrown upon the legatee when the legacy is received by him. The penalties in this case were incurred by reason of the delay in the course of the administration in this country for which the legatee was in no way responsible. The administration proceeded on the footing that Lady Sackville was not entitled to these chattels until the executors had assented to the gift. They did not assent until (1.) it was ascertained what was included in the gift; and (2.) probate had been granted. The English administration prevented Lady Sackville from getting the chattels in France as legatee. The question is whether, having thus been kept out of possession of her legacy,

(1) (1875) L. R. 20 Eq. 304, 314.



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she ought to pay the penalties. On principle it is submitted that it would be unjust so to hold: *Chaworth v. Beech*. (1) The dictum there expressed amounts to this, that the depreciation in a specific legacy due to the exigencies of the administration does not fall upon the specific legatee but upon the residue. That principle governs this case. The specific legatee is intended by the testator to have the chattel in the state in which it existed at his death. If it be in the hands of somebody whose charges, before it can be handed over, increase owing to the delay in it being handed over, that is no more than a depreciation of the legacy.

*Sir R. Finlay, K.C., Jenkins, K.C., and MacSwinney*, for the plaintiffs. The second point of the appellant's argument rests upon a supposed duty on the part of the executors to bring the chattels to England and deliver them to the legatees here. There is no such duty on an executor. There is no authority in support of the proposition that it is the duty of an executor to bring a chattel, which is specifically bequeathed, from any part of the world where it may be and deliver it to the legatee here. It is inconsistent with principle, because as soon as assent is given to the legacy the property in the chattel vests in the legatee. If chattels were bequeathed which had been left at the South Pole or in Berlin, the executors would be under no obligation to go to the South Pole or to Berlin and bring the chattels here to present to the legatee.

Then as to the penalties *Chaworth v. Beech* (1) is no authority for the proposition relied upon by the appellant. Unless it be found that the executors have been guilty of wrongful conduct causing delay and thereby occasioning loss to Lady Sackville, there can be no foundation for this claim.

[LORD COZENS-HARDY M.R. Even if there had been such a case the liability would have rested upon the executors personally.]

Yes, and not upon the assets.

Upon the first point, as to the meaning of the bequest "free of legacy duty," it is said that it means "free from all taxes and imposts," and therefore that the legacy is free from this

(1) (1799) 4 Ves. 555, 567.

mutation duty. The testator could not have intended that, because he was to some extent acquainted with the law of France and knew that this French duty was totally different from English legacy duty. It is submitted that he meant "free from the English legacy duty in the ordinary sense of the words." That the term "legacy duty" is well known is confirmed by a reference to the following statutes, namely: the Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 21; the Stamp Act, 1815 (55 Geo. 3, c. 184), s. 3, Schedule, Part III.; the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 1, 18; the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2, Sched. I.; the Short Titles Act, 1896 (59 & 60 Vict. c. 14); the Finance Act, 1910 (10 Edw. 7, c. 8), s. 58.

An illustration of the well-known meaning of the term "legacy duty" is afforded by *In re Johnston*. (1) From this it is clear that the testator used what is really a term of art which has a thoroughly well-established meaning in English law, and he meant what he said. By saying that the legacy was to be free from legacy duty he in effect said it was not to be freed from anything else.

Then it is said that by the Finance Act, 1910, s. 63, power is given to the Treasury to extend the exemption from estate duty, given by the Finance Act, 1896, in respect of objects of national scientific or historic interest, to legacy and succession duty, and further to extend it to unsettled property and to objects of artistic interest. That power of exemption does not alter the meaning of the words "free of legacy duty." Then as to the authorities. In *Perry v. Meddowcroft* (2) the question arose whether the expenses of the executors in getting in certain costs which had been specifically bequeathed by the testator ought to be borne by the general estate or by the specific legatee out of his legacy; and it was held that they must be paid out of the general estate as administration expenses. The observations of Parker J. in *In re De Sommers* (3) are very applicable to the present case. There shares in a French company were specifically bequeathed by an English testatrix upon certain trusts to her executors, who

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(1) 26 Ch. D. 538, 555.

(2) 4 Beav. 204.

(3) [1912] 2 Ch. 622, 628.

C. A. paid the mutation duty on them and incurred costs in realization.  
 1915 Parker J. held that the duty and costs ought to be borne by the  
 SCOTT, proceeds of the shares in question, and said: "With regard to the  
*In re.* French succession duty, I should have thought this clear even  
 SCOTT without authority, but the case of *In re Brewster* (1) seems to be  
 r. a decision to that effect."  
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In the latter case Swinfen Eady J. said, with reference to *Peter v. Stirling* (2) and *In re Maurice* (3), that both those cases were really contests between shares of residue, while the case before him was a contest between a specific devise and residue, which he thought made the whole difference.

In *In re Pearce* (4) it was held that the expense incurred in the upkeep and preservation of specifically bequeathed property between the death of the testator and the assent of the executors to the bequest is payable by the specific legatee and not out of the general estate of the testator.

In Jarman on Wills, 6th ed. p. 2015, the view is expressed that the decision of Eve J. in *In re Pearce* (4) was right in spite of *Sharp v. Lush* (5) (not cited to Eve J.), in which Jessel M.R. expressed a different opinion.

[PHILLIMORE L.J. It was argued in *In re De Sommery* (6) that where there is a specific gift of movables abroad the executors must bring the asset to the legatee free from foreign duty.]

Parker J. answered that by saying that the only duty of the executors was to assent to the gift of the shares to themselves, and that answer applies to this case. It is submitted that both on principle and authority the appeal fails.

*Peterson, K.C.*, and *A. J. Spencer (F. H. L. Errington with them)*, for other parties interested in the residue. Prima facie "legacy duty" means the duty which is imposed by English statutes in respect of legacies. There is nothing in this will to suggest that the testator meant anything else. With reference to the penalties, Lady Sackville is liable to pay them and she cannot show that she is entitled to be indemnified

(1) [1908] 2 Ch. 365, 368.

(2) 10 Ch. D. 279.

(3) 75 L. T. 415.

(4) [1909] 1 Ch. 819.

(5) (1879) 10 Ch. D. 468.

(6) [1912] 2 Ch. 622.

as against other persons. The delay which occasioned the incurring of the penalties was one of the incidents of litigation.

*Dighton Pollock* in reply.

LORD COZENS-HARDY M.R. This is an appeal from two decisions of Warrington J. upon the construction and the effect of a bequest of certain specific legacies of great value given by the testator, Sir John Murray Scott, to the present appellant. The point is this. The will gives various pictures and works of art, which were at the time of his will apparently, and certainly at the time of his death, locally situated in Paris. He was a domiciled Englishman, and his will is in the English language. It uses phrases which are perfectly familiar to us in England. The first question is whether, under the clauses which I shall shortly have to read, the gift of these very valuable chattels in Paris, which are specifically given "free of legacy duty," means not merely free from English legacy duty, to which confessedly they are subject, but whether it means, in addition to that, free from the mutation duty payable according to French law upon chattels which are found at the testator's death in France.

Now the will, as far as this is concerned, is very short. The testator gives to Lady Sackville-West "for her sole and separate use and free of legacy duty all my pictures engravings furniture busts silver plate and works of art of every description where-soever situate except at 5 Connaught Place and 8 Chandos Street London or wherever may be situate my London house or except those bequeathed specifically by this my will or any codicil thereto and further the sum of 150,000*l*." What do the words "free of legacy duty" mean? I am not in doubt as to the meaning of those words in this will. They are words which are familiar to every English lawyer; they are words which have been found in many statutes of recent years, and although in the very early statutes the phrase was "duty payable in respect of legacies," to say that there is any great distinction between that and legacy duty passes my understanding. I think, therefore, unless there is something which enables us to find that he has used those words "free of legacy duty" in any other than their proper legal grammatical English sense, we are bound to say that

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they must have that sense. I cannot see, looking at it carefully, anything in the will which lends any colour to a different interpretation of the will. We have been asked this question: When there is a gift to the National Gallery of some valuable pictures "free of legacy duty," can it have been intended that the testator should have made a gift of these very valuable pictures to the National Gallery, leaving the trustees of the National Gallery to pay the mutation duty on them according to French law? It does not shock me at all. It seems to me if they were simply given without the words "free of legacy duty" of course the National Gallery trustees would have to pay the French mutation duty. But to say that the effect of that gift is to put an unnatural meaning on the words used, namely, "free of legacy duty," is what I cannot adopt. Then it has been pointed out, and I think it is worth mentioning, that in the last codicil—the testator made five codicils, I think—he says: "And in case I shall in my lifetime have made any disposition purporting to operate as immediate gifts 'inter vivos' and by reason of the Finance Act 1910 or any statutory modification thereof any death duties shall become payable on my death in respect thereof then I hereby direct that such duties shall be payable by my executors out of my general personal estate." He was aware of the distinction according to English law between legacy duty and any other death duties; it shows his acquaintance with English law; and as it has been decided before, and I think quite properly, that a gift free of legacy duty would not apply to succession duty or to estate duty, it is an a fortiori case to say that it cannot apply as a matter of construction to the mutation duty which is payable under French law, and upon that, which is the main point of the appeal, I entirely concur with the judgment of Warrington J.

But then we have heard an interesting and elaborate argument on a second point. It is said that it is the duty of an executor, where there is a specific bequest of property which is in a foreign country, to go to that foreign country and to procure the specific article, to pay what is necessary in order to get it, and to bring it back to this country. Each one of us has asked, I think, for a statement by any text-writer to support that proposition. I can

find none, and it is conceded there is none. Is there anything in principle which can justify it? I think not, for many reasons, but the one that strikes me most is this. When there is a specific legacy the first duty of the executor is to consider whether he assents to it or not. If he assents to it the property passes out of him and is in the specific legatee, and from that moment the executor cannot possibly interfere with the possession of the chattels, cannot claim them from anybody else, and the legatee who has the legal title is the person to recover them, and to do what is necessary. Of course, in saying this, I do not mean to assert, or even to imply, that there may not be such conduct on the part of an executor in wilfully and improperly delaying the assent to a legacy as may entitle the specific legatee to claim compensation or damages, pecuniary relief against him, for what would be a breach of trust. But we start in the present case with this finding of the learned judge, that the executors in this case have acted with perfect propriety and have carried out their duties according to English law, acting as they have under the direction of the Court, a receiver being in possession during a large part of the time. Under those circumstances, there being no authority to support the proposition, I am clearly of opinion that we ought not to hold that it was the duty of the executors towards this present appellant to go to Paris to pay this mutation duty in order to get possession of the property and deliver it to the legatee.

I may further say, as at present advised, I do not see how they could have got it in Paris, because the French law does not recognize executors as such at all, but only recognizes either the specific legatee, according to the one view, or the residuary legatee according to the other. That being so, without going into the authorities which have been cited to us beyond mentioning the recent decision of Parker J. in *In re De Sommery* (1), I think that we must hesitate to regard *Perry v. Meddowcroft* (2) as an authority to which great (if any) weight ought to be attached. I agree entirely with the comments of Parker J. upon that, and I think, in the decision which we are giving, we are not in any way interfering with anything

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(1) [1912] 2 Ch. 622.

(2) 4 Beav. 197, 204.

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that has been said on this point by any judge to whose judgments our attention has been called.

The third point is this. It is said, even if Lady Sackville is liable to pay the mutation duty payable in respect of this legacy, there are penalties imposed by French law for delaying the payment of duties for a certain time after the testator's death which are not payable by her. There was, of course, a great deal of delay in the present case, because there was very heavy and important litigation as to the validity of the will, and it was only after proceedings were taken in the Probate Court that the will was established. Of course during that period nothing could be done, and during that period no doubt the penalties were running. But the right view on this question is, I think, that which is plainly put by Warrington J. in his judgment on this point. These penalties are really in substance an extra mutation duty, standing exactly in the same position as that duty, and the person who has to pay the mutation duty has, in the events which have happened, also to pay the penalties. If there were any other person liable to pay these extra duties who had neglected to do so, then the present appellant, when she comes to pay that which has to be paid, might be entitled to claim an indemnity from that other person. But when once it is conceded that the executors have done only that which was their duty, I fail to see how it can be held that there is any obligation upon any person whatever, except upon the present appellant, to pay these penalties. It is put by Warrington J. in a short sentence (1) : "It is quite true that she was not placed in possession of her legacy, but the reason for that was a proper reason ; she has not been in any way wrongly kept out of her legacy, the executors have committed no wrong against her, and nothing, therefore, seems to me to give rise to any claim for an indemnity. It seems to me that this penalty is as much the mutation duty as the original mutation duty to which my decision of February of this year applied, and that the legatee has no right to recover the penalty any more than she has a right to recover the mutation duty."

For these reasons I think the judgments of Warrington J.

(1) *Ante*, p. 599.

were right upon all the points and that this appeal should be dismissed.

PHILLIMORE L.J. I am of the same opinion. As regards the first point, after what has been said by Warrington J. in the Court below and by the Master of the Rolls to-day, I can absolve myself from doing anything more than putting it in a very short compass. The testator has used words of art, and though it may be that from other parts of the will you may deduce the view that he has used words of art inartificially, unless you can make this deduction you must treat those words of art as meaning what they technically do mean. "Legacy duty," to my mind, is a word of art, and means duty payable under English or British law. If there was no legacy duty payable, if there was nothing in the way of any duty on the succession but the mutation duty, one might then be driven to suppose that the testator had used a word of art in an inartificial sense, but, inasmuch as there is ample to satisfy the words "free of legacy duty," there is no reason for our supposing that they mean more than they say. What the testator intended, or what he would have done if he had had the point present to his mind, I cannot guess; I may have my suspicions or my conjectures, but it is not for me to guess, and it is safer to rest upon general law in these matters.

The second point is a different one, and would arise if the words "free of legacy duty" had never been used. It rests upon the contention that it is the duty of executors either to deliver a specific legacy to the legatee at his domicile, or at least to bring it home to the testator's domicile and let the legatee have it. There really is, and it is strange, no authority on the subject except the language of Warrington J., which is, up to a point, against his own conclusion. There are a number of cases which say that where a chattel is bequeathed, and that chattel is at the testator's death subject to some lien or pledge, at any rate one that he has created himself, (possibly, according to Sir George Jessel M.R., whether he has created it himself or not,) the testator is supposed to have given the chattel free of all lien or pledge, so that it is the duty of the executors either to redeem the pledge or to give the value of the chattel. That is

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C. A. not the point. Apart from that there is only this language of  
1915 Warrington J. that it is the duty of the executor to deliver the  
SCOTT, chattel. The argument on behalf of Lady Sackville is that this  
*In re.* being a specific legacy the duty of the executors is to deliver the  
SCOTT subject of the legacy to the legatee, and that any expenses which  
*v.* they may incur in order to do that are charges and expenses  
SCOTT incurred by them in their capacity as executors and therefore  
Phillimore L.J. payable out of the general estate. Stated in that general way  
I think the contention on the part of the specific legatee is  
correct; but then Warrington J. goes on to show why it does not  
apply. I have been thinking over the matter, and I should be  
sorry if anything were said here which would make an executor  
surchargeable who in an ordinary case went to the expense of  
packing up a picture or some valuable chattel and sent it to  
the home of the legatee in some other part of England or  
even some near part of the Continent. One knows that in  
practice executors are always expected to do this sort of thing,  
and a legatee who may be left a picture or some token  
does not expect to have to bear the cost of packing and send-  
ing it. In that sort of way it may be very well held that  
the testator intends, when he gives a bequest of this kind,  
that it should reach the hands of the specific legatee, if it is  
only a reasonable matter of packing and transfer, without  
expense; but beyond that I decline to go. I know of no autho-  
rity that the executors are bound to bring a chattel to the  
testator's domicile, or to bring it from foreign parts in order to  
deliver it to the legatee. If the argument is worth anything it  
would involve this, that whenever chattels specifically bequeathed  
are locally situated in some foreign country, and there is a duty  
of any sort payable on these chattels by reason of the death of  
the testator, it falls to the executors to redeem these chattels, to  
ransom them, as it were, from the foreign country, and bring  
them away and deliver them safely to the legatee. By this time  
of day if there were any such duty upon executors there would  
have been authority for it, and I decline to hold that there is  
any such duty.

With regard to the last matter, I confess that I have a great  
deal of sympathy with Lady Sackville, and I think it is hard on

her that, in the events which have happened, she should have to pay these penalties, and I have been struggling to see if I can find any ground upon which I could relieve her. But to relieve Lady Sackville would be to impose a burden on the residuary legatees, and I cannot find any misconduct on the part of the residuary legatees or of the executors. At least I am relieved from inquiring whether there is anything that can be complained of on the part of the executors by the express admission of Lady Sackville's counsel. In truth the delay may be divided into two periods. The first is the period for which the executors are certainly not responsible—it is the period during which somebody who contested the will left the whole matter in doubt, and made it necessary to have a receiver, and made it impossible to deliver any of these chattels to the legatees. The second period is a period which I have more doubt about; but counsel for Lady Sackville has said that the executors, in the peculiar circumstances of the case, were entitled to take the opinion of the Court before they parted with at any rate a great portion of these chattels, because it was very doubtful whether they passed under the will or not. That being so, it is Lady Sackville's misfortune that the testator did not express himself more clearly, and that the chattels have had to remain all this time in medio, and that therefore it was not possible to free them from the duty or from the penalties which are accessory to the duty.

Before I conclude, this observation leads me to add another. Whatever might be said of a case where the English law applied, and where the assent of the executors is necessary to the obtaining by the specific legatee of his legacy, in a country like France, where the legatee, and the legatee only, is the person who can recover the legacy, it seems to me ridiculous to put upon executors the duty of getting the legacy and bringing it home. *Lex neminem cogit ad impossibilia*.

For those reasons I agree that this appeal fails.

JOYCE J. In this case I think it must be taken that the testator said what he meant, and that he meant simply what he said. In an English will the natural meaning of the term "legacy duty" is a definite, well-known thing, namely, the

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duty imposed upon legacies by the Act of 1796 and subsequent Acts relating to the same subject. That is what the term "legacy duty" means, and in my opinion it means nothing else. No doubt one can conceive of a case in which the term "legacy duty" has been used with regard to a subject which is not liable to legacy duty; and I can conceive that it might be held that in certain special circumstances, not that the term "legacy duty" meant estate duty or settlement duty or something else, but that the testator, when he used the term, must have meant something else. Now in the present case all the bequests are liable to legacy duty properly so called. If this testator or the draftsman, when the will was made, knew about the mutation duty—when I say "knew" I mean had it in his mind—and intended that also to be paid out of his general estate, it is incredible, to my mind, that he should not have used language very different from that which he has in fact used. If, on the other hand, he did not have this question of the French duty in his mind—had forgotten it, if you like—and so had no definite formed intention on the subject of the manner in which it should be paid, how can we give any other than the natural meaning to the term "legacy duty" from some conjectural notion as to what the testator would probably have done if his attention had been called to the existence of the French duty?

So much for the question of construction. No doubt where there is a specific bequest of chattels that are in pledge at the time of the testator's death that pledge must be redeemed out of the testator's estate, but in my opinion that rule does not apply to making the residuary estate liable to pay something which is imposed upon the legatee upon or after the death of the testator.

With reference to the penalties, I agree entirely with what Warrington J. has said, and I think this appeal fails.

Solicitors: *Meynell & Pemberton; Capron & Co.*

G. A. S.

*In re O'GRADY'S SETTLEMENT.*O'GRADY *v.* WILMOT.

[1914 O. 687.]

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Feb. 25.

*Settlement—Real Estate—Trust for Sale—Conversion—General Power of Appointment over Proceeds—Exercise of Power by Will—Reconversion—Determination of Trust for Sale—Estate Duty—Incidence—“Property which does not pass to the executor as such”—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9, sub-s. 1.*

Testatrix, in exercise of a general power of appointment over the proceeds of sale of real estate which was settled upon trust for sale, by her will appointed that the trustees of the settlement should stand possessed of the “hereditaments property money stocks funds and securities” which should be subject to the trusts of the settlement upon trust to “convey assign transfer and pay” the same to the trustees of the will upon trust for conversion with power to postpone conversion. The trust for sale under the settlement had not been exercised during the life of the testatrix :—

*Held*, that whether or not the testatrix had by her will indicated an intention that the property should go to her appointees as real estate, it was, in equity, at the time of her death personalty which, under the decision in *In re Hadley* [1909] 1 Ch. 20, passed to her executors “as such” within s. 9, sub-s. 1, of the Finance Act, 1894; and, therefore, that the estate duty in respect thereof was not charged upon the appointed property, but was payable out of the residuary estate.

Decision of Eve J., ante, p. 39, reversed.

*In re Lord Grimthorpe* [1908] 2 Ch. 675 distinguished.

## APPEAL from a decision of Eve J. (1)

By an indenture dated November 28, 1881, certain freehold hereditaments in Northumberland were conveyed to trustees upon trust, after the marriage of the settlor, Mrs. O'Grady, at her request in writing during her life, and after her death at their discretion, to sell the same, and to stand possessed of the net proceeds upon the trusts declared by a second indenture of even date, those trusts being to invest the said net proceeds and stand possessed thereof and of the stocks, funds, shares, or securities for the time being representing the same and of the income thereof respectively “upon trust for such person or persons and

(1) Ante, p. 39.



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 1915 deed or will appoint, and in default of or subject to any such  
 O'GRADY'S appointment upon trust to pay the income of the trust premises  
 SETTLEMENT, to the settlor for life and after her death to her husband for life,  
*In re.* with remainder as to corpus and income to the issue of the  
 O'GRADY marriage.  
*v.*  
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By her will dated in October, 1909, Mrs. O'Grady, after reciting the two indentures of November 28, 1881, declared as follows: "Now by virtue and in pursuance and in exercise of the said recited power of appointment reserved to me by the said indentures of settlement of the 28th day of November, 1881, and of all other powers me hereunto enabling, I hereby appoint that the trustees for the time being of the said settlement shall from and after my decease stand possessed of all the hereditaments property money stocks funds and securities of whatsoever nature which at the time of my decease shall be subject in any way to the trusts of the said indentures of settlement upon trust to convey assign transfer and pay the same to" her husband and Arthur George Rideout, whom she thereby appointed to be her trustees. She then declared the trusts of the appointed property which, shortly stated, were for sale and conversion with a power to postpone and a superadded direction not to sell any of the property during the life of her husband without his consent. Subject to an annuity to her brother she gave the income of the appointed property to her husband for life and made him her residuary legatee.

The testatrix died on January 12, 1910.

Between the date of the settlement and her death certain small portions of the settled property had been sold and on each occasion, the settlor having by deed appointed the proceeds of sale to herself, the purchase-money was paid to her.

At the date of her death the bulk of the settled property remained unsold and she was and had been continuously from the date of the settlement in receipt of the rents and profits.

The question arising upon the appeal was as to the incidence of the estate duty payable on the death of the testatrix in respect of the appointed property.

Eve J. decided that the duty was charged on the appointed

property as "property which did not pass to the executor as such" within s. 9, sub-s. 1, of the Finance Act, 1894.

Against this decision persons interested in remainder in the appointed property appealed.

*Clayton, K.C.*, and *Bovill*, for the appellants. The property is settled throughout as personalty and the duty is payable out of residue as testamentary expenses.

The question turns upon the Finance Act, 1894, s. 9, sub-s. 1. Land notionally converted is personalty for the purposes of paying duty. Personalty appointed under a general power of appointment passes to the executor as such. The appointment makes the property assets for the payment of debts and it passes to the executor. It is only by the assent of the executor to the bequest that it passes to the appointee. At the moment of the death it is personal estate and passes to the executor as such: *In re Hadley*. (1) If the testatrix had reconverted the property by deed during her life no question could have arisen, but the reconversion into realty (assuming it to have been intended by the testatrix) could not take place until after the property had passed to the executor at her death.

Eve J. relied upon *In re Lord Grimthorpe* (2), but that case is clearly distinguishable, for there the trust for sale did not arise until after the death of the testator. The property was at home, the testator being the owner in fee. Here the testatrix had only a general power of appointment.

*Maugham, K.C.*, and *A. J. Spencer* (*F. H. L. Errington* with them), for the respondent, the residuary legatee and tenant for life of the appointed property. The decision in *In re Hadley* (1) does not govern this case. It is immaterial whether the appointed property was personalty or realty, the appointment makes it assets for the payment of debts. Where real estate is appointed under a general power it becomes assets for the payment of debts, but it does not pass to the executor as such. The appointee is in the same position as a devisee from an absolute owner. The creditors have no right over the appointed property until all the other property of the appointor has been exhausted.

(1) [1909] 1 Ch. 20.

(2) [1908] 2 Ch. 675.

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*Fleming v. Buchanan* (1) shows that land appointed under a general power is assets for the payment of simple contract debts, but only after all the testator's own property has been previously so applied. The appointed realty passes to the appointee and not to the executor. The appointor in this case had the right to appoint by deed or will, and as real or personal estate. If she has appointed it as realty it goes to the appointees (subject to the payment of debts) direct, without the interposition of the executors. The appellants here approbate the will for the purpose of determining whether the power has been exercised, but seek to reprobate it when the Court comes to consider whether the appointment is of real or personal estate. The testatrix had power to appoint the property as land or as money. She has appointed it as land. Why is that not enough? It goes to the appointees direct without going through the executor at all. A person having a general power of appointment by deed or will can make the property his own for all purposes and so put an end to previous trusts: *In re Van Hagan*. (2) What has happened here had the effect of destroying the trust for sale for all purposes so that no one can insist upon its being carried out: *In re Lord Grimthorpe*. (3)

The testatrix in this case made the property her own at the moment of her death. The incidence of the duty ought not to be made to depend upon considerations in which there is no substance at all. The testatrix appointed the property as realty and the reconversion into realty took place at the moment of her death. [They also referred to *Townshend v. Windham* (4) and *Stead v. Newdigate*. (5) ]

No reply was called for.

[In the Court below (6) *G. H. Allen* appeared for the trustees of the will.]

LORD COZENS-HARDY M.R. This case has been strenuously argued, and if it had come for decision before the judgment in

(1) (1853) 3 D. M. & G. 976.

(2) (1880) 16 Ch. D. 18.

(3) [1908] 2 Ch. 675, 679.

(4) (1750) 2 Ves. Sen. 1.

(5) (1817) 2 Mer. 521.

(6) Ante, p. 39.

this Court in *In re Hadley* (1) we should have had very considerable difficulties to deal with, and probably should have taken time to consider our decision. But *In re Hadley* (1), in which there was a considered judgment of this Court, and which has never been questioned in the House of Lords, or, so far as I am aware, elsewhere, decides in terms that where personal property is subject to a general power of appointment by will, that property, although given beneficially to A., B., or C., whoever it may be, is property which vests in the executor "as such" within the meaning of the words of the Finance Act. That is the kernel of the decision in that case. It vests it in the executor "as such" as legal assets.

We start then with that proposition. Now in the present case there is a large estate settled on the marriage of Mr. and Mrs. O'Grady. By that settlement the property was vested in trustees upon trust to sell and to hold the proceeds upon the trusts of a second indenture. If we look at the deed of even date we see that there is an overriding power given to the wife enabling her to appoint either by deed or by will. She did not appoint by deed, and, in the events which have happened, she was the tenant for life, her husband, who is still living, was the next tenant for life, and, there having been no issue of the marriage, after the death of the husband the property goes to the statutory next of kin of the wife. That was the settlement.

Now it cannot be and has not been disputed that the real estate was notionally converted into money. That is quite plain. Then we come to her will. She makes a will which recites the settlement. She manifestly intends to exercise, and does exercise, the general power conferred upon her by the settlement, and she appoints executors. Under these circumstances, it seems to me that we should be really overruling *In re Hadley* (1) if we hesitated to say that this was notionally personal property appointed under a general power by the will, and that that vested in the executors "as such" within the meaning of the Finance Act.

It is said that that is not right, because if the will is looked at sufficient indication will be found of an intention on the part of

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C. A. the testatrix that this property should be dealt with and taken  
 1915 as real estate by the persons taking under her will, on this  
 O'GRADY'S ground: that she herself appointed new trustees and gave them  
 SETTLEMENT, a power of sale or a trust for sale expressly over this property as  
*In re.* well as over other properties which she might have; and it is  
 O'GRADY said that there is an indication of intention in her will that  
*v.* as between her beneficiaries the property should not be sold  
 WILMOT. by the trustees of her will, still less by the trustees of the  
 settlement.  
 Lord  
 Cozens-  
 Hardy M.R.

In my opinion, that is irrelevant. My judgment would be exactly the same even though I found on the face of this will: "I execute the power that I have under the marriage settlement; I appoint all property to A. B. and declare that he shall take it as real estate." I cannot put it more favourably to the respondent than that. In my opinion, that would not in the least interfere with the rule laid down in *In re Hadley* (1), for this reason, that a testatrix cannot in exercise of a power change the nature of the property from personal property to real estate in her lifetime. The beneficial dispositions have nothing to do with the fact that the property vests in the executors "as such."

Eve J. seems to have thought that there was something in the decision of this Court in *Lord Grimthorpe's Case* (2) which had a bearing upon the present case. *Lord Grimthorpe's Case* (2) when looked at, I think, does not justify any such conclusion. There the whole property was in Lord Grimthorpe's lifetime, to use the old phrase, at home; he was entitled both to the land and to the beneficial interest therein. The property was vested in trust for sale, but he was the only possible beneficiary; and that being so, there was no one who could properly say that the character of the property, which was de facto land, should be turned into money after his death. I think there is no relevancy in that case, because this was not at any moment of time the absolute property of the lady. You must, it seems to me, take the estate as it existed at the moment of her death. At the moment of her death it was notionally personal estate; it vested in the executor "as such" with all the consequences that may be involved under the Finance Act.

(1) [1909] 1 Ch. 20.

(2) [1908] 1 Ch. 666; [1908] 2 Ch. 675.

For these reasons, without going again into the authorities which were so much considered in *In re Hadley* (1), I think the view taken by Eve J. was wrong, and that this appeal ought to be allowed.

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—

PHILLIMORE L.J. I am of the same opinion.

We start with the decision in *In re Hadley* (1) that personal property appointed by will under a general power vests for the purposes of the Finance Act in question in the executor "as such." In this case the property was notionally personal estate at the death of the testatrix. Under her general power she has appointed. If it was personal estate when she appointed, it passes to the executor. It has been suggested that her intention was to make it realty not merely to make it pass by limitations analogous to limitations of realty, but to make it realty at her death. I will assume this: it was argued for the respondent that it was so, and counsel only desisted from further argument on our intimating that it made no difference in our view. I think it right to say that as far as the argument has gone, and without hearing a reply, my inclination was to think that the testatrix did have the intention which is contended for. But I think it is quite immaterial. If at the moment of her death it was personal estate, and being personal estate would pass to her executor, her intention as to its subsequent devolution is immaterial. Even a declaration of intention to convert comes too late. I think that is the best way to express what I mean. I do not think the decision in *In re Lord Grimthorpe* (2) conflicts with our present decision, or warrants the decision of the Court below.

At the same time I agree that there are observations in that case which, so far as the argument has proceeded, do to my mind offer some difficulty. But the decision has nothing to do with this case, and the two may, in my view, very well stand together.

I agree that this appeal should be allowed.

JOYCE J. In this case I am unable to see how the decision of the judge in the Court below can be supported.

It is admitted, and could not be denied, that the real estate

(1) [1909] 1 Ch. 20.

(2) [1908] 2 Ch. 675.

C. A.      comprised in the settlement was thereby converted in equity into  
1915      personal estate. In my opinion, Mrs. O'Grady could not, except  
O'GRADY'S      by deed, have appointed this property so as to make it pass as  
SETTLEMENT,      land on her death, unless there had been a previous notional  
*In re.*      reconversion in equity in her lifetime. At the moment of her  
O'GRADY      death there had been no such reconversion. The will, even if it  
*v.*      be expressed in terms that would be sufficient to effect a notional  
WILMOT.      reconversion, does not and could not operate until after her death.  
Joyce J.      It is established, in my opinion, that where there is an exercise  
                by will of a general power of appointment by will over that which  
                is actually personal estate or personal estate in equity, such  
                personal estate actual or notional vests in the executor, who has  
                to pay the duties at death. This lady, Mrs. O'Grady, might  
                have directed the property in question in this case to be treated  
                as land. But this, unless she did it by deed, could operate only  
                after her death upon the property as vested in the executor,  
                whose business it is to discharge the debts of the appointor and  
                the duty payable on her death.

In my opinion, the consequence is that this duty is payable out of the residuary personal estate.

Solicitors: *Gibson & Weldon, for F. W. Romney & Co., Malvern; Darley, Cumberland & Co.*

G. A. S.

## HATTON v. CAR MAINTENANCE COMPANY, LIMITED. SARGANT J.

[1913 H. 3097.]

1913

Dec. 19.

1914

Jan. 28.

*Lien—Motor Car—Agreement to keep in repair and supply Owner with  
Chauffeur and Materials—Receiver.*

The owner of a motor car had an agreement with a company under which the latter were for three years to maintain the car and its accessories, provide a driver who was to be the company's servant, and do the necessary repairs. The owner was to pay the company a fixed annual sum up to a limited mileage and at a rate for every mile beyond the limit. The car when in London was kept at the company's garage, and whether the owner was in London or elsewhere she took the car out when and as she liked. An amount having become due by the owner under the agreement, the company took possession of the car and claimed a lien on it for the amount due:—

*Held*, (1.) that inasmuch as what the company did to the car was not to improve it, but only to maintain it in its former condition, the company had no lien on the car; (2.) that even if the company had a lien, their lien would have been lost by the arrangement (acted on) under which the owner was entitled to take away the car as and when she pleased.

THE plaintiff, a lady, was the owner of a motor car which she had purchased from some person other than the defendant company.

By an agreement dated July 26, 1913, between her and the company, it was agreed that the company should for three years well and sufficiently maintain the car, the property of the owner, and supply all petrol, lubricant, tyres, tubes, and other things necessary for the proper running of the car, and repair breakdowns. The company was also to provide and pay a competent, suitable, and respectable driver, who was to drive the car in accordance with the orders and directions of the owner, but was to be deemed the servant of the company, and the company was also to wash, clean, and well and sufficiently maintain the car and the engine, machinery, tyres, and all parts thereof, and keep the same in good repair and fit for use. The plaintiff was to pay the company a fixed sum per annum up to a total mileage of 8000 in any year and an additional 7*d.* per mile for every mile in excess of that.



SARGANT J. The plaintiff lived occasionally in London, but sometimes at  
1914 Amesbury, and while the car was in London it was kept at the  
HATTON company's garage, but was taken out as often as the plaintiff  
7. wanted it, and it was taken down to Amesbury whilst the owner  
CAR MAIN- was there for the time being.  
TENANCE  
COMPANY,  
LIMITED.

At a time when the plaintiff owed the company about 85l. under the agreement, at the rate of so much per annum, and was herself desirous of selling the car, the company were anxious as to obtaining payment. The plaintiff sent the car with the chauffeur to London to certain persons connected with motor cars for the purpose of its being sold, and one day when it was in London an officer of the company saw the car and told the chauffeur to drive it to the garage of the company. When it was there the same officer took one tyre off it, so that the car could not go at all. The company claimed to have a lien on the car, and to retain it, for the amount due under the agreement.

The plaintiff moved for the appointment of a receiver of the car, and by her writ of summons she also claimed a declaration that the company had no lien or charge on the car, and an order for delivery up of the car.

The motion was heard on December 19, 1913.

*Roger Turnbull*, for the plaintiff. It has been held that where a bailee has expended labour and skill in the improvement of the subject delivered to him—as in the case of training a horse for a race—the bailee has a lien for the expense and skill bestowed in bringing the horse into condition: *Bevan v. Waters*. (1) But here the company merely maintained the car in its existing condition, pursuant to their contract, and no case can be found where a lien was held to exist under such circumstances. If there was a lien, it was lost by the arrangement under which the plaintiff could obtain possession of the car at any time, and by the possession she from time to time obtained.

*Talbot K. Crossfield*, for the defendant company. The company has a lien on the car for the amount due under the agreement. Whenever an article is repaired the repairer gets a lien on the article for the amount of his charges. A coachbuilder has a

(1) (1828) 1 Moo. & M. 235.

lien on a carriage for repairs done to it: *Keene v. Thomas*. (1) SARGANT J. The car was improved every time it was repaired by the company. But the fact that no improvement is effected in the article is not inconsistent with a lien. An innkeeper's lien is a case in point: *Mulliner v. Florence*. (2)

*R. Turnbull* in reply. The rule as to there being no lien where the chattel has not been improved is illustrated by *Judson v. Etheridge* (3), the case of a jobmaster; *Jackson v. Cummins* (4), *Richards v. Symons* (5), cases of agistment of cattle; *Somes v. British Empire Shipping Co.* (6), as regards charges for retaining property on which there is a lien. On the other hand, where the property is improved there is clearly a lien, as in *Scarfe v. Morgan* (7), the case of a lien on a mare for being covered by a stallion; and *Forth v. Simpson* (8), another case of a trainer having a lien on a racehorse.

SARGANT J. This is a motion for the appointment of a receiver of a certain motor car. I should not think it necessary to say much on the motion beyond stating that I was going to appoint a receiver unless I understood that certain other proceedings were standing over until the determination of the motion. This being so, however, I had better express my opinion, although of course the only result will be the appointment of a receiver until the hearing of the action, and matters will not now be finally determined between the parties. [His Lordship stated the facts as above set out, and continued:] The question is whether the company are entitled to a lien on the car for the amount due to them from the owner, which is about 85*l.*, under that agreement, at the rate of so much per annum.

Now it is clear that the amount to be paid is not merely for the repair of the car, but is for the wages of the chauffeur and the supply of petrol and oil, and that kind of thing, and therefore it is an inclusive lump sum.

It was said by Mr. Crossfield that whenever an article is

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(1) [1905] 1 K. B. 136.

(2) (1878) 3 Q. B. D. 484.

(3) (1833) 1 Cr. & M. 743.

(4) (1839) 5 M. & W. 342.

(5) (1845) 8 Q. B. 90.

(6) (1860) 8 H. L. C. 338, 345.

(7) (1838) 4 M. & W. 270.

(8) (1849) 13 Q. B. 680.

SARGANT J. repaired, the repairer gets a lien on the article for the amount of his charges. Well, I do not dissent at all from that view of the law, assuming that the repairer gets the article in his shop for the purpose of repair and by that repair improves it, as he would ordinarily do. But certainly I cannot find anything in the authorities which have been cited to me to show that, if what the contractor does is not to improve the article but merely to maintain it in its former condition, he gets a lien for the amount spent upon it for that maintenance. The cases with regard to horses seem to point entirely the other way, because it is clear that a jobmaster has no lien at all for the amount of his bill in respect of feeding and keeping a horse at his stable, whereas, on the other hand, a trainer does get a lien upon a horse for the improvement which he effects to the horse in the course of training it for a race. A case was cited to me by Mr. Crossfield with regard to the extent of the lien of an innkeeper, but I do not think that has really any application to the present case. Here all that was to be done by the contractor was for the purpose of maintaining the car in the condition in which it was sent to him, and in my judgment he would have no lien, that is no common law lien, in respect of the amount owing to him for that service.

That really would be sufficient to dispose of the case, but I think I ought also to express my opinion that, on the cases cited to me, even if he had such a lien originally, that lien would be lost by virtue of the arrangement under which the owner was to be at liberty to take the car away, and did take the car away, as and when she pleased. The existence of a lien seems to me to be inconsistent with an arrangement under which the article is from time to time taken entirely out of the possession and control of the contractor, for I cannot think that the fact that the chauffeur was to be deemed to be the servant of the company was intended to have the effect, or had the effect, of leaving the car in the possession of the company. I think that clause was inserted for quite other and fairly obvious reasons.

Accordingly I feel clear that I ought to appoint the person suggested receiver of the motor car until the trial or further

order, and if this were the hearing I should grant the plaintiff SARGANT J.  
 a declaration that the company had no lien or charge on the 1914  
 car, order delivery up of the car to the plaintiff, grant an inquiry HATTON  
 as to damages and an inquiry as to the amount due under the v.  
 agreement, give the plaintiff the costs of the action, and direct CAR MAIN-  
 the amount of damages and costs to be set off against the amount TENANCE  
 due to the company under the agreement. COMPANY,  
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By consent, the Court gave the receiver liberty to allow the plaintiff the use of the car while in his possession.

The case was set down without pleadings, advanced by order, and tried as a witness action by Sargent J. on January 28, 1914, who in delivering judgment said that he saw no reason for departing from the conclusions of law at which he arrived when appointing the receiver. He accordingly made a declaration in favour of the plaintiff, as asked, and granted her an inquiry as to damages. He also gave her the costs of the action, granted an inquiry as to what was due by her to the company, and directed a set-off of the damages and costs against the amount due under the agreement.

Solicitors for plaintiff: *Brooks, Jenkins & Co.*

Solicitor for the company: *E. Chase Carr.*

F. E.



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March 1, 2.

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[1914 D. 554.]

*Will—Charitable Legacy—Debentures of Australian Land Company—Floating Security—Office in London—"Interest in land" in England of no Value—Apportionment—Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), ss. 4, 10.*

A testator who died in 1891 bequeathed, after a life interest, so much of his residuary personal estate as was by law applicable to charitable legacies to two charities. Part of his residuary estate at his death consisted of 3000*l.* secured by the debentures of an Australian land company which were a charge upon all the real and personal assets of the company. The only property in England possessed by the company was some furniture and a leasehold office in London of no appreciable value. By the law of Australia money charged on land could be validly given by will to charitable purposes:—

*Held*, that the debentures did not pass to the charities.

Decision of Neville J., ante, p. 168, affirmed.

*In re Hill's Trusts* (1880) 16 Ch. D. 173 overruled.

#### APPEAL from a decision of Neville J. (1)

Richard Dawson, by his will, dated January 19, 1891, after appointing two persons executors and trustees of his will, and after making divers specific and pecuniary devises and bequests, gave the residue of his real and personal estate unto his trustees upon usual trusts for sale, conversion, and investment, and directed his trustees to stand possessed of the trust premises, in the events which happened, for his son William Dawson for life, and after his death, as to so much of the trust premises as might not by law be applicable to charitable legacies, upon trust for his nephew Richard Watkins absolutely, and as to so much of the trust premises as might by law be applicable to charitable legacies upon trust for the Sussex County Hospital at Brighton and Mrs. Gladstone's Hospital for Convalescent Patients at Woodford in equal shares.

The testator died in February, 1891, and part of his residuary estate at that time consisted of 3000*l.* in debentures of the South Australian Land Mortgage and Agency Company, Limited, and

(1) Ante, p. 168.

3000%. in debentures of the Anglo-Australian Investment Finance and Land Company, Limited.

Richard Watkins predeceased the testator.

William Dawson, who was the only child and therefore the heir-at-law and sole next of kin of the testator, died in 1913, and the defendant Bathurst was his legal personal representative. Questions then arose under the testator's will, and the plaintiffs, who were the executors of the surviving trustee of the testator's will, took out a summons to determine (amongst other things) whether the debentures of the two Australian land companies could be validly bequeathed for charitable purposes.

As the testator died before the passing of the Mortmain and Charitable Uses Act, 1891, the law applicable to his residuary estate was that comprised in the Mortmain and Charitable Uses Act, 1888.

The debentures of the South Australian Land Mortgage and Agency Company were in the following form:—

“ TERM Five Years.

INTEREST Five per Cent.

“(One of a series of debentures issued under the authority of the articles of association and a resolution of the directors of the company, the amount of which is so restricted that the total debt of the company for the time being shall never exceed the unpaid portion for the time being of the subscribed capital.)

“ The South Australian Land Mortgage and Agency Company, Limited, in consideration of the sum of                      pounds sterling advanced to the said company by                      for the purposes of the said company is held and firmly bound and doth hereby bind itself to pay the said sum of                      unto the said                      on the twenty-fourth day of November 1888 as hereinafter provided (or in the event of a renewal of the said advance or any part thereof, on such other day as shall be expressed in a memorandum to be endorsed on the back of this debenture bond) and interest thereon . . . . And for the due payment at maturity of the money hereby secured the said South Australian Land, Mortgage and Agency Company, Limited, doth hereby charge all the real and personal property, book debts, credits, assets, money

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and effects of the said company of what nature or kind soever, which the said company shall then hold or be possessed of, or entitled to, such charge to rank equally with all other debentures issued or to be issued by the said company and secured or to be secured in the like manner and not by way of priority or preference over any such debentures.

“This debenture and the interest coupons thereto annexed shall not carry interest against the company after the same respectively shall have become due and payable. Dated the twenty-fourth day of November 1883.”

The debentures of the Anglo-Australian Investment Finance and Land Company were as follows:—

*“ Debenture.*

“This debenture is one of a series numbered 1 to 3000 inclusive, in bonds of 100*l.* each, issued under authority of clause 2 of the articles of association and of a resolution of the directors dated 17th September, 1889.

“The Anglo-Australian Investment Finance and Land Company Limited (hereinafter called ‘the company’) hereby acknowledges that it is indebted to                      in the sum of 100*l.* (one hundred pounds) and the company will, on the 1st day of January 1900 or on such other day as the principal moneys hereby secured become payable in accordance with the conditions endorsed hereon, pay to the said                      the sum of 100*l.* The company will in the meantime pay interest on the principal moneys hereby secured . . . .

“The company hereby charges as a first charge all its uncalled capital and the company hereby charges by way of floating security all its undertaking and all its real and personal property now or at any time hereafter belonging to the company with the payment of the principal moneys and interest hereby secured *pari passu* with all the debentures of the above series, without preference or priority by reason of date of issue or otherwise.

“This debenture is issued subject to the conditions endorsed hereon.

“Given under the common seal of the said company, London, the 30th day of May 1890.”

There were no debenture trust deeds. At the time when the testator acquired his debentures both companies had considerable land and other property in Australia, but no property in England other than an office in London and some office furniture. In the case of the South Australian Land Mortgage and Agency Company, Limited, its registered office was at 2, Moorgate Street Buildings, which consisted of four rooms held under a five years' agreement at a rack rent, and as the tenancy expired in September, 1891, it was of no value. The company renewed the tenancy after September, 1891, and was still a going concern. It paid off the debentures in 1893. In the case of the Anglo-Australian Investment Finance and Land Company, Limited, it had an office in Lombard Street to register transfers of shares, and some furniture of small value. In 1894 a debenture-holders' action was instituted against the company in England in which the property and assets of the company were realized, and the executors of the testator received 1520*l.* in respect of their debentures.

It appeared that according to the law of South Australia charities could acquire and hold land in South Australia as freely as a private individual, and that any moneys forming part of the estate of a testator charged on land situate in South Australia could be validly given by his will for charitable purposes, and that the law was the same in all the Australian States.

Neville J. held that although the value of the London offices was exceedingly small it was included in the security as well as the pure personalty; the debentures were therefore a charge on mixed personalty and could not pass to the charities.

The charities appealed.

*Butcher, K.C.*, and *J. M. Paterson*, for the Sussex County Hospital. The only interest in land in England included in these debentures consists, in the case of the South Australian Company, of a lease at a rack rent of two rooms in the City of London upon a term expiring seven months after the death of the testator. The tenancy under which the other company held its London office was equally trivial. Such an interest in land

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C. A. is of infinitesimal value and should be disregarded in considering the validity of a gift to charity.

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This bequest is not a gift of land or an interest in land within s. 10, sub-s. iii., of the Act of 1888: *In re Christmas*. (1) In construing the Mortmain Acts it is important to consider the terms of the preamble of the Act 9 Geo. 2, c. 36: *In re Hume*. (2)

In *In re Pickard* (3) it was held that corporation debenture stock charged on rates and "the revenue of all landed and other property of the corporation" was not an "interest in land" within the Mortmain Act (9 Geo. 2, c. 36), s. 3.

This is really a case of *de minimis non curat lex*. It would reduce the policy of the Mortmain Acts to an absurdity to say that the existence of a merely nominal interest in land should defeat a gift to charity: see Broom's Legal Maxims, 8th ed. p. 118.

Alderson B. in *Attorney-General v. Lockwood* (4) said: "The rule of law, I take it, upon the construction of all statutes, and therefore applicable to the construction of this, is, whether they be penal or remedial, to construe them according to the plain, literal, and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the Act, or to some palpable and evident absurdity."

*Arthur v. Mackinnon* (5) is an illustration of the principle of *de minimis*. See also *The Reward*. (6)

The Court will have regard to the substance and construe the Act so as to avoid the mischief thereby aimed at. The mere possession by a company of a leasehold office as a necessary incident to its trade does not constitute an interest in land such as will bring a bequest of the company's debentures within the Statute of Mortmain: *Myers v. Perigal*. (7) See also *Ashton v. Lord Langdale* (8), where railway debentures were treated as not obnoxious to the statute. In *Morris v. Glynn* (9)

(1) (1886) 33 Ch. D. 332.

(2) [1895] 1 Ch. 422, 425.

(3) [1894] 3 Ch. 704.

(4) (1842) 9 M. & W. 378, 398.

(5) (1879) 11 Ch. D. 385.

(6) (1818) 2 Dods. 265.

(7) (1852) 2 D. M. & G. 599, 691, 620.

(8) (1851) 4 De G. & Sm. 402, 410.

(9) (1859) 27 Beav. 218.

it was laid down that the question whether the shares in a company can be bequeathed to a charity depends upon whether the substantial object of the company is or is not a dealing with land, and whether the land held by it is or is not merely ancillary to a trading independent of the land.

[PHILLIMORE L.J. referred to Tyssen on Charitable Bequests, p. 361.]

There is here no gift of any interest in land within the statute. The interest to be obnoxious to the statute must be real and not merely nominal and valueless: *Attree v. Hawe* (1); *Ashworth v. Munn*. (2)

*Peterson, K.C., Marcy, and O. R. Simpkin*, for Mrs. Gladstone's Convalescent Home. We support the same contention. A debenture of a railway company does not give the debenture-holder an interest in land within the Statute of Mortmain, 9 Geo. 2, c. 36: *In re Mitchell's Estate*. (3) The object of that Act was shown by the preamble to be to prevent the disherison of lawful heirs: *Attree v. Hawe*. (4) It has nothing to do with trade adventures. Real property purchased for the purpose of carrying on a trade and shares in companies are not within the statute: *Myers v. Perigal* (5); *Entwistle v. Davis*. (6) The test is whether the security can result to the holder in the shape of land: *Brook v. Badley* (7); *Ashworth v. Munn*. (8) There is no possibility of the holders of these debentures obtaining anything in the shape of land. True, a single holder of all the debentures might foreclose, but the holder of one of a series of debentures could not do so. There is no decided case which says that debentures secured by a floating charge on the undertaking of a limited company are within the statute, although a specific charge may be in a different position: *In re Florence Land and Public Works Co.* (9) The only thing which the Mortmain Act, 1888, makes void is an assurance of land or an interest in land, and the question is whether this bequest is

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(1) (1878) 9 Ch. D. 337.

(5) 2 D. M. &amp; G. 599, 620.

(2) (1880) 15 Ch. D. 363.

(6) (1867) L. R. 4 Eq. 272.

(3) (1877) 6 Ch. D. 655.

(7) (1868) L. R. 3 Ch. 672.

(4) 9 Ch. D. 346.

(8) 15 Ch. D. 363, 371.

(9) (1878) 10 Ch. D. 530, 546.

C. A. valid. If not so it must be on the ground that it is a devise of an  
 1915 interest in land. In reality the debt is the only thing which  
 DAWSON, passes by the bequest, and that is not touched by the Act. The  
*In re.* holder can release the security and keep the debt and in that  
 PATTISSON way sever the one from the other. The Act does not forbid an  
*v.* assurance of the debt. There may be a difficulty in directing an  
 BATHURST. apportionment: *Brook v. Badley* (1); *In re Watts* (2); but we  
 submit that in this case it should be done and *In re Hill's*  
*Trusts* (3) followed. That case is treated as sound in *Jarman on*  
*Wills*, 6th ed. vol. i. p. 251: *Tudor on Charities and Mortmain*,  
 4th ed. p. 452. It seems to have followed *Smith v. Sopwith*. (4)  
 [PHILLIMORE L.J. referred to Tyssen on Charitable Bequests,  
 p. 358.]

The principle of *de minimis* applies to this gift. It would be  
 absurd to upset a large legacy on account of so valueless and  
 trifling a matter.

*S. A. Sampson*, for the trustees.

*Jenkins, K.C.*, and *M. J. Beebe*, for the defendant Bathurst.  
 The charge on these offices is an interest in land within the  
 statute. A debenture-holder might get a receiver of them. It  
 has been held that a contract for sale of debentures secured by a  
 floating charge on the undertaking and property of a company  
 which owns leasehold property is a contract for the sale of an  
 "interest in land" within s. 4 of the Statute of Frauds: *Driver*  
*v. Broad*. (5)

[LORD COZENS-HARDY M.R. referred to the report of that case  
 in the Court below. (6)]

The holder of a debenture secured by a floating security has a  
 present charge, and a debenture may or may not be charged on  
 an interest in land. Cases which refer to shares do not apply to  
 debentures: *Ashworth v. Munn*. (7) The question is not what  
 the charity can take under the will, but what was the interest of  
 the testator in the property which he attempted to devise to the  
 charity: *Ashworth v. Munn*. (8) The critical date is the date of

(1) L. R. 3 Ch. 672, 675.

(2) (1885) 29 Ch. D. 947, 953.

(3) 16 Ch. D. 173.

(4) [1877] W. N. 208.

(5) [1893] 1 Q. B. 744.

(6) [1893] 1 Q. B. 539, 544.

(7) 15 Ch. D. 363, 368.

(8) 15 Ch. D. 373.

the testator's death, and there is no doubt that at that time he had an interest in land within the Act. It is too late to say that the debt can be separated from the charge. There can be no apportionment. [They were stopped on this point.] The doctrine *de minimis non curat lex* does not apply to such a case as this. It may be that the English premises are of no value, but the doctrine only applies to the refusal by the Court to pay attention to anything which is of no consequence. This is really an important point, for the title of the parties depends on it: *Arthur v. Mackinnon*. (1) The Court must administer the law as it stands: *The Reward*. (2)

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*Butcher, K.C.*, in reply. There is no case which decides that a floating security gives an interest in land. We admit that if this were a specific charge we should be wrong. Under a floating security a debenture-holder does not get an interest in land as long as the company is a going concern. The Statute of Mortmain is restrictive, and different considerations arise from questions under the Statute of Frauds: *Tudor on Charities and Mortmain*, 4th ed. p. 15. We do not dispute the correctness of *Driver v. Broad* (3), but it has no application. The Court can avoid the absurdity of invalidating this gift on such a ground: *In re Hume*. (4) The preamble to an Act of Parliament is the key to the understanding of it: *Maxwell on the Interpretation of Statutes*, 5th ed. p. 69. To constitute an interest in land within the Act there must be a real, not a nominal, interest. Such offices as these do not constitute interests in land: *Ashton v. Lord Langdale* (5); *Morris v. Glynn*. (6) There was no interest in land till these debentures matured, and that was not till after the testator's death.

LORD COZENS-HARDY M.R. This is an appeal from the decision of Neville J. which has been argued very strenuously and ably, but I have been unable to feel any doubt that the decision of the learned judge is perfectly right. The testator in this case died at a time when the Mortmain Act of 1888, which

(1) 11 Ch. D. 385.

(2) 2 Dodds. 265, 269.

(3) [1893] 1 Q. B. 539, 744.

(4) [1895] 1 Ch. 422.

(5) 4 De G. & Sm. 402, 410.

(6) 27 Beav. 218, 223.



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repealed the Act of 9 Geo. 2, was in force. He died before the Act of 1891 was passed. If he had had the good fortune to live a few months longer we should not have had this discussion and the charities claiming under his will would plainly have been able to take that which the testator intended them to have. A judge ought not to have any sympathy in a case of this kind, but I confess I have great sympathy with the appellants, and it would have been a great satisfaction to me if I could have decided in their favour; but I am bound to decide it according to what in my belief is the law applicable to the case.

Now, the first point to consider is this: Is there any distinction for any material purpose to-day between the Act of 9 Geo. 2 and the Act of 1888? In my opinion there is none whatever. In the statute of 9 Geo. 2, s. 3, there are words prohibiting grants of "any charge or encumbrance affecting or to affect any lands." In the Act of 1888 you have not those words, but these—s. 10, sub-s. iii.—" 'Land' includes tenements and hereditaments corporeal and incorporeal of whatsoever tenure, and any estate and interest in land." It cannot, I think, be seriously contended that a mortgage or charge upon land is not an estate and interest in land. I, therefore, am bound to consider that for the present purpose there is no difference between the Act of 1888 and the Act of 9 Geo. 2, and, therefore, the authorities (and they are very numerous) which have dealt with the old Act are authorities which are applicable to the present case. We have been told that it has been settled by a long series of decisions that shares in companies are not within the Act. That is true, of course, as far as trading companies and incorporated companies are concerned, and it is equally true, according to *Myers v. Perigal* (1), of an unincorporated company the perpetuity of which is contemplated and where it is not intended that shares should be dealt with except by transfer. *Myers v. Perigal* (1) has been explained, and explained I think most satisfactorily, in this Court in *Ashworth v. Munn*. (2) I will read what Cotton L.J. says: *Myers v. Perigal* (1) "was a decision with reference to an unincorporated joint stock company. The distinction between corporation and unincorporation is, in my opinion, entirely

(1) 2 D. M. & G. 599.

(2) 15 Ch. D. 363, 375.

immaterial ; but that applies to a company the principle of which was this, that it should have a continuing existence notwithstanding the changes in the persons who constituted the partnership, that is to say, in that, as in other joint stock companies not incorporated, there is an attempt to give—and a successful attempt to give—a quasi-corporate character to the body called in ordinary language the company to distinguish it from partnership. Whether the partners die, or whether they transfer their shares to others, which they are ordinarily at liberty to do without any prohibition or restraint, the body or the company is to continue ; the business is to be carried on under a partnership for the benefit of those who for the time being may be in union, either by originally taking shares or by taking a transfer of shares. As a consequence the shares can be realised not only by winding up the whole concern but by selling them in the market.” That which has been really the basis of a great deal of the argument which we have heard seems to me to have absolutely no relevance to the case of debentures given by a company. A debenture we must construe according to the language used, and if it is, according to its tenor, a charge on land, I see no reason to doubt that such a debenture given by a limited company is just as much obnoxious to the statute of 1888 or the statute of 9 Geo. 2, as the case may be, as a mortgage by an individual.

The point was referred to, and I think in a satisfactory mode, in the case of *Driver v. Broad*. (1) It is true that was a case under the Statute of Frauds. There it was held that a debenture of a limited company fell within the Statute of Frauds, so that there must be evidence in writing to maintain an action upon the sale of it. Mathew J., whose decision was affirmed by the Court of Appeal, says : “ A number of cases decided under the Mortmain Act were cited on behalf of the plaintiff. But the authorities referred to do not appear to me to be in point, and for the reasons given by the defendant’s counsel ; that in those cases either the interest in the companies with which the Court was dealing consisted of shares, and a shareholder’s position in

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regard to the real assets of the company is wholly different from that of a debenture-holder, or else, in those in which the interest consisted of debentures, such debentures purported to charge only the profits or earnings of the undertaking, and not as here to mortgage the property of the company with power to the mortgagee on the mortgagor's default to sell the estate." I think the distinction is vital between a shareholder and a debenture-holder. A debenture-holder by means of the appointment of a receiver can get possession of the property; he can secure its realization, its winding up; and the first thing that a receiver or a receiver and manager would do would be to take possession of the company's office. That would be the very first thing he would do. I therefore think that the authorities which have been cited to us as to the position of shareholders in a company incorporated or unincorporated have no bearing whatever upon the present case; the question is simply: Is there or is there not on the face of these debentures that which in the view of the law is a charge upon real estate?

As to the two debentures, no point arises on the first because it is conceded that that is a charge, according to its construction, upon real estate, subject to the point only of *de minimis* which I will hereafter deal with. It is a charge on land. With regard to the other debenture, the South Australian Company's debenture, it is said there is no charge. I am entirely unable to follow the appellants' argument on that point. It is said that this debenture, which was one of an issue of 600,000 secured mainly on property in Australia, did not give any charge at all because there was a covenant to pay at maturity. But there is an express charge—"doth hereby charge all the real estate, property, book debts," and so on. At the testator's death this debenture was running. Either the original time had not elapsed or it had been extended by indorsement. I do not grasp the argument at all that this is an absolutely unsecured charge because the date of maturity had not arrived; that we have to wait and see whether it is or is not a charge. This Court put the more simple case of an individual who covenants to pay 10,000*l.* twelve months hence and to charge any real estate which at that time he may have in payment of it. Could it

possibly be said that pending the twelve months there was not even a contingent charge upon the real estate? Any charge or interest whether it be contingent or not is quite sufficient to satisfy the statute. I therefore think as a matter of construction of both these debentures there was a charge upon land.

But then it has been urged strongly upon us that there is no real charge, that the Act was only intended to prevent property from being taken from the heirs, and it must be of such a nature that there is a substantial probability of effectual possession being taken by the devisee. That seems to me to be absolutely inconsistent with a case of great authority, *Brook v. Badley* (1), decided by Lord Cairns, which was, I think, a much more difficult case than anything we have to-day to deal with. There the head-note is: "A legacy payable out of personalty and of the proceeds of the sale of real estate, is an interest in land within the Statute of Mortmain, and cannot, whilst it remains unpaid, be bequeathed by the legatee for charitable purposes." It is scarcely conceivable that the charity could have got any possession of real estate there, because the property which was given or purported to be given to the charity was a legacy under the prior will payable out of the personalty and out of the proceeds of the sale of real estate. Lord Cairns disposed of that and held that that was just as much within the prohibition of the statute of 9 Geo. 2. He also in that judgment dealt with the point that there cannot be any apportionment. There might have been a good deal said, I think, for the view that the charity might have taken so much of the legacy as according to principles established by this Court might well have been given to the charity; but that was not the view which was taken. Lord Cairns said: "There is no doubt as to the rule of the Court in the administration of the estate of a testator possessing both personal and real estate who gives legacies to charities. The legacies, after taking an estimate of the values of the personalty and realty, so far as they would be made to fall on the personalty are supported, and so far as they would fall on the realty are invalid. But this is a case altogether of a different kind, for there is no apportionment between the different parts of the

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(1) L. R. 3 Ch. 672, 675.



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estate of the testatrix at all. The testatrix at the time of her death had an item of property, which is a sum of 3000*l.*, secured not upon her own property, but upon the property of another testator, who has charged both his real and personal estate with the payment of that 3000*l.* It seems to me to be just the same thing as if the second testatrix had at the time of her death a sum of 3000*l.* secured to her by a mortgage both of real and personal estate. It has never been suggested that in such a case the Court would have jurisdiction to make any apportionment. The charge is a charge upon every part of the security, and may come out of the personalty, or may come out of the realty, or may come out of both."

The principle of that case came again before this Court in the case of *In re Watts* (1), where this Court expressly and in terms approved of *Brook v. Badley* (2), and held that there could be no apportionment. Cotton L.J. says: "The whole mortgage debt is charged on realty as well as on pure personalty, and what the appellant asks us to do is not to apportion but to marshal. Where a sum of money is given which is charged both on land and personalty, so that the whole is recoverable out of the land, I think there ought not to be an apportionment in order to take the bequest out of the statute." Fry L.J. says: "I think that every pound of this sum is charged on the whole of the mortgaged property, and therefore is charged on land." Applying that to the present case, there is on each of these debentures a sum of money which is charged on land. It is true it is only in fact on offices in London of little or no value, but it is a leasehold interest in land in the City of London. The question cannot depend upon the quantum of the real estate. I am unable to appreciate the doctrine of *de minimis* as applied to this case on the construction of these debentures. I ask myself, Aye or No, is this debenture according to its construction a charge upon land? Was there land? Yes. Accordingly it seems to me that the result is inevitable, and that we must hold, with whatever regret we may feel, that the gift to the charities in this instance fails. We have this

(1) 29 Ch. D. 947, 953, 954.

(2) L. R. 3 Ch. 672.

satisfaction, that the point upon which our decision is given will probably never arise again because of the Act of 1891.

Before concluding I wish to say that in my opinion the decision of Malins V.-C. in *In re Hill's Trusts* (1) cannot be supported and must be considered as no longer law.

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PHILLIMORE L.J. I agree that the distinctions between the Act of 1888 and the Act of 9 Geo. 2 are not sufficient to support any different construction of bequests for the purpose of these Acts. We have to deal with the case of a bequest of debentures. I start by distinguishing all those cases of debentures on which there have been many decisions, the principal one and the key to them being *Attree v. Hawe* (2), where debentures have been held by the Court to be a charge upon tolls or other personal matters and not upon realty. Those cases stand entirely by themselves. As to trading companies which have either ex necessitate or naturally and usually some interest in land, some fulcrum from which to work their lever which is to move the world, it is to be observed that the decisions of *Entwistle v. Davis* (3) and *Myers v. Perigal* (4) are decisions upon shares, and they are decisions which since *Ashworth v. Munn* (5) must be considered as resting upon the principle that although they were shares in unincorporated companies they were nevertheless to be treated on the same principle as if they were shares in companies. The language of Cotton L.J. (6) which has been referred to by the Master of the Rolls expresses this, and there is a passage in the judgment of James L.J. (7) which I should like to quote: "The great distinction between that class of cases"—he is speaking of *Myers v. Perigal* (4) at the moment—"and the case of a private partnership is this, that in all those cases the intent and meaning of the partners is that the partnership, whether it be large or small, is to be in the nature of a corporation, they are all of them intended to have perpetual existence, and they are all intended to exist with fluctuating bodies of members

(1) 16 Ch. D. 173.

(2) 9 Ch. D. 337.

(3) L. R. 4 Eq. 272.

(4) 2 D. M. & G. 599.

(5) 15 Ch. D. 363.

(6) 15 Ch. D. 375.

(7) 15 Ch. D. 368.

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 1915 ever supposed to have anything to do with the land except as  
 DAWSON, one of the society through the machinery provided by the Act  
*In re.* or deed of settlement, and is never intended to have anything  
 PATTISSON to do with the land in any shape or form except to get the profits  
*v.* from the land or the profits from the business of which the land  
 BATHURST. is a part, and it is always intended that every share should pass  
 Phillimore L.J. in the market as a distinct thing, and in point of beneficial  
 ownership wholly unconnected with the land or with the real  
 assets of the partnership property of the company." As a  
 contrast to that class of cases *Ashworth v. Munn* (1) decided that,  
 part of the assets being real estate, an interest in the partner-  
 ship must be treated as undivisible to a charity under the Act  
 of 9 Geo. 2. The distinction between the two classes of shares  
 is thereby drawn.

Now I come to the question of debentures. I agree, and it is  
 curious, that there is no case upon the debentures of ordinary  
 limited trading companies with debentures which charge all their  
 assets, whether as a floating charge or as a present charge.  
 Whether a charge in futuro or a charge in praesenti I do not think  
 matters at all. There is no case upon the subject, and to that  
 extent our decision is upon a new point. But we are driven, as  
 it seems to me, by *Brook v. Badley* (2), by *Ashworth v. Munn* (1),  
 and by *Driver v. Broad* (3) (both decisions of Mathew J. in  
 the Court of first instance and in the Court of Appeal) to decide  
 that on principle these debentures are charges on land, and being  
 charges on land a bequest of such debentures is a bequest of an  
 estate or interest in land; and although the conclusion may almost  
 seem grotesque I am driven to accept it. There is enough  
 interest in land in these companies, there is enough charge of the  
 companies' interest in land, to make a debenture-holder who can  
 get a receiver, who can maintain an action for the sale of the  
 assets, and who has a charge on the assets in the meanwhile, a  
 holder of an interest in land.

Now it is suggested that at any rate you could apportion or  
 divide—I think the word preferred was “divide”—or marshal

(1) 15 Ch. D. 363.

(2) L. R. 3 Ch. 672.

(3) [1893] 1 Q. B. 539, 744.

this bequest and say so much of it or nearly the whole of it, or even practically the whole of it beneficially, is a charge upon the personal assets of the company, and the remainder which is a charge upon realty is either unimportant or small. You cannot so divide a charge. A charge is a charge upon every portion of the assets whether real or personal. The distinction between dividing the estate of a testator into items, which is one thing, and the notional breaking up of one item into different charges, which is quite another thing, was established by Lord Cairns in *Brook v. Badley* (1), and was confirmed and carried a little further perhaps by this Court in *In re Watts* (2); and the decision of Malins V.-C. in *In re Hill's Trusts* (3) is one which cannot be supported. Therefore that point also fails.

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I think there is nothing in the point of the form of the South Australian debenture. It may be that you ought to construe it as a contingent charge or a charge in futuro. Nevertheless it is a charge on land and creates an interest in land.

Then with regard to the doctrine of *de minimis*, it is enough to say that I am afraid it cannot be applied to this class of case.

I should not like to conclude my judgment without saying that I quite agree with what Brett L.J. said in *Ashworth v. Munn* (4), and I think other judges have said, that the decisions upon the old statute of George II. went very far and I might almost say into extravagant consequences, and that I am extremely glad that the statute of George II. and the statute of 1888 have both been modified by the Act of 1891, and it is not likely that we shall have another similar case to decide.

JOYCE J. Lord Lindley used to say that some things were settled whether we liked it or not, and so in the present case I think the question which has been argued is really settled by authorities binding upon this Court.

Now, it is not necessary for me to compare the Act of 1888 with that of 9 Geo. 2. That has been done already by the Master of the Rolls. The result is that for the purposes of this

(1) L. R. 3 Ch. 672.

(3) 16 Ch. D. 173.

(2) 29 Ch. D. 947.

(4) 15 Ch. D. 363.



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case there is no real difference in effect between the two. Under the old law a debenture of a railway company charging only the undertaking, that is the net earnings or profits and nothing else, was not a charge on land nor an interest in land. That also was the case with other debentures of a similar character, although many of the cases have turned on rather fine considerations. But where the debenture in question was or contained a mortgage or a charge upon land and was not merely a charge upon earnings or the like it could not be given by will for charitable purposes under the old law, and the same is the case with respect to the Act of 1888. There is no alteration between the Act of 9 Geo. 2 and the Act of 1888. It is different since 1891.

The Master of the Rolls has considered the details of the debentures in this case, and I agree with him as to the results of the construction which he places upon them. These debentures certainly as matters have turned out are charges upon land in England coupled with other property. If the case had been one merely of a devise or bequest of such premises as are charged by these debentures, namely, property in England and property abroad, then of course to the extent of the property in England the gift would have been bad and as regards the property abroad would have been good. But here what we have to consider is a bequest of debentures. Each debenture, as it appears to me, is a single thing not severable into two things, and each of them contains unfortunately an ingredient, namely, a charge on English land, which makes a bequest of it to a charity void. You cannot get rid of or ignore this ingredient because the English land which is charged by the debenture is of small or trifling value. I regret to say that to my mind it infects the whole. The cases of *Brook v. Badley* (1) and *In re Watts* (2) are, of course, binding in this Court and are unimpeachable authorities, and following those decisions the result is that in this case these debentures could not at the time when the testator died be bequeathed for charitable purposes, and the appeal fails. I agree, as I say, that *Brook v. Badley* (1) and *In re Watts* (2) are unimpeachable authorities

(1) L. R. 3 Ch. 672.

(2) 29 Ch. D. 947.

binding upon this Court, and that the case of *In re Hill's Trusts* (1) is one which is not to be followed.

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Appeal dismissed.

Solicitors: *Clarke, Calkin & Son, for Howlett & Clarke, Brighton; Oliver & Lyall; Hores, Pattisson & Co.*

H. C. R.

*In re* MONOLITHIC BUILDING COMPANY.

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TACON *v.* THE COMPANY.

1914

[1914 M. 826.]

ASTBURY J.

Oct. 19, 20.

*Company — Mortgages — Registration — Unregistered Mortgage — Notice — Priority — Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 93.*

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Feb. 25, 26.

Sect. 93 of the Companies (Consolidation) Act, 1908, avoids an unregistered mortgage as against a subsequent registered incumbrancer even though he had express notice of the prior mortgage at the time when he took his own security.

Decision of Astbury J. reversed.

WITNESS ACTION.

The above company was incorporated as a private company on November 9, 1912.

By a mortgage dated March 3, 1913, the company conveyed certain freehold hereditaments at Barnet Gate to the plaintiff in fee simple by way of mortgage for securing the repayment with half-yearly interest of a sum of 500*l.* advanced by the plaintiff to the company.

The company's seal was affixed in the presence of the two managing directors, namely, the defendant Jenkins and another, and the secretary.

The company's solicitor acted for both parties in this transaction, but owing to a misapprehension of the law caused by a misstatement in a well-known text-book the mortgage, being a

(1) 16 Ch. D. 173.

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C. A. mortgage of land not for securing debentures, was not registered  
1915 ✓ under s. 93 of the Companies (Consolidation) Act, 1908. (1)

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On June 12, 1913, the company issued a first mortgage debenture to the plaintiff to secure another advance of 800*l.* with half-yearly interest. This debenture stated that the 800*l.* advance was entirely independent and separate from the previous 500*l.* secured by the mortgage. The debenture created a floating charge on the company's undertaking and assets including the Barnet Gate property comprised in the mortgage.

The company's seal was affixed in the presence of the two managing directors and the secretary, and the debenture was registered on June 26, 1913.

On December 12, 1913, the company issued a second mortgage debenture to the defendant Jenkins to secure an advance of 500*l.* with half-yearly interest. This debenture was expressly subject to the plaintiff's debenture, but it did not mention the mortgage.

The company's seal was affixed in the presence of the defendant Jenkins and a new secretary who was also a director and the debenture was duly registered on December 24, 1913.

The indorsement on this debenture stated that it was "subject to prior incumbrances." It was originally indorsed "subject to a prior incumbrance," but there was no evidence when the alteration was made.

By a sub-mortgage dated March 3, 1914, the defendant Jenkins charged the moneys secured by his second debenture with the payment of certain moneys to the defendant Calway.

(1) The Companies (Consolidation) Act, 1908, by s. 93 provides: "Every mortgage or charge created after the first day of July, 1908, by a company registered in England or Ireland and being either— . . . (d) a mortgage or charge on any land, wherever situate, or any interest therein . . . shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge,

together with the instrument (if any) by which the mortgage or charge is created or evidenced, are delivered to or received by the Registrar of Companies for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section the money secured thereby shall immediately become payable."

On March 13, 1914, Calway's solicitors gave the company's solicitor notice of this sub-mortgage, and pointed out that the mortgage of the plaintiff for whom he was also acting was void against the liquidator and any creditor for want of registration under s. 93.

By an order dated March 27, 1914, and made on the plaintiff's application against the company as sole respondent, the time for registration of the plaintiff's mortgage was extended until April 17, 1914, "without prejudice to the rights of parties acquired prior to the time when such mortgage shall be actually registered." The mortgage was subsequently registered on April 3, 1914.

The mortgage interest due on March 3, 1914, was not paid and no interest had been paid on the first debenture.

On March 31, 1914, the plaintiff brought this action against the company and the defendants Jenkins and Calway to enforce her securities, claiming priority for her mortgage as well as her first debenture over the securities of the defendants Jenkins and Calway.

The priority of the first debenture was not contested, but the priority of the mortgage was contested on the ground that it had not been registered within twenty-one days of its creation, or at the time the securities of the defendants Jenkins and Calway were effected. The defendant Calway also relied on want of notice of the plaintiff's mortgage, but this point failed on the evidence.

The company appeared, but put in no defence, and as against them judgment went in default of defence.

The action came on for hearing before Astbury J. on October 19, 1914.

*Hon. Frank Russell, K.C.*, and *Lyttelton Chubb*, for the plaintiff. The question is whether s. 93 avoids an unregistered mortgage against a subsequent registered incumbrancer with notice. Sub-s. 1 (d) provides that a mortgage or charge on any land "shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company," unless the prescribed particulars of the mortgage or charge, together with the instrument,

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are delivered to the registrar for registration within twenty-one days after its creation. Sub-s. 2 provides that the registrar shall register the date, amount, short particulars of the property, and the names of the mortgagees. Sub-s. 7 provides that it shall be the duty of the company to send the particulars of the mortgage to the registrar, but registration may be effected on the application of any person interested therein. Sect. 96 enables the Court to extend the time for registration. Sect. 99 imposes penalties on the company and its officers for knowing and wilful default. In the present case, however, all parties to the transaction were misled by the text-book, and the non-registration arose from an innocent mistake.

Now s. 93 is merely an extension of the Companies Act, 1900 (63 & 64 Vict. c. 48), s. 14, the purpose of which was to ensure the means of notice to those who contemplated giving credit to the company: *In re Cardiff Workmen's Cottage Co.* (1) Sect. 93 was evidently passed with the same object and not for the purpose of enabling a subsequent incumbrancer with notice to get priority.

The policy of the section is the same as that of the Middlesex Registry Act, 1708 (7 Anne, c. 20), which is explained in *Le Neve v. Le Neve* (2) and numerous other authorities. In the present case the defendant Jenkins is clearly postponed by notice, and as his security was only equitable, his assignee Calway, whether he had notice or not, is in no better position: *Ford v. White*. (3) The same rule obtained in the case of annuities that had not been registered under the Judgments Act, 1855 (18 & 19 Vict. c. 15), s. 12, and a purchaser with notice was postponed to the unregistered annuity: *Greaves v. Tofield*. (4)

[ASTBURY J. Does s. 93 affect a going company at all?]

A going company cannot repudiate an unregistered mortgage, but a creditor without notice can do so.

[ASTBURY J. A registered title can only be affected by clear and distinct notice, amounting to fraud: *Chadwick v. Turner*. (5)]

The notice here was clear and distinct. There was no fraud

(1) [1906] 2 Ch. 627, 629.

(2) (1748) 3 Atk. 646.

(3) (1852) 16 Beav. 120.

(4) (1880) 14 Ch. D. 563.

(5) (1866) L. R. 1 Ch. 310, 319.

in taking and registering the second debenture. No one knew the mortgage required registration. But when the necessity for registration was discovered, it became a quasi-fraud to take advantage of the omission.

*Sir Charles Macnaghten, K.C., and J. W. Manning*, for the defendant Jenkins. There are two kinds of registration of company securities—(a) registration in the company's register, and (b) registration with the registrar. The former was directed by the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 43, now replaced by ss. 100, 101, of the Consolidation Act, and there was no provision for avoidance of the security in default of registration: *Wright v. Horton*. (1) The latter, with which we are now dealing, was first imposed by the Companies Act, 1900, s. 14, and the security, in default of registration within twenty-one days, was avoided against the liquidator and any creditor.

The 1900 Act applied to mortgages for securing debentures, mortgage debentures, and other specified securities, but not to a mere mortgage of land. This was, however, included in the Companies Act, 1907 (7 Edw. 7, c. 50), s. 10, and is included in s. 93 of the Consolidation Act. It is clear, therefore, that registration of covering deeds and mortgage debentures has been in force for fourteen years, and registration of simple land mortgages for seven years, and the fact that the point as to notice has never before been raised shows that there is no substance in it.

The Middlesex Registry Act, 1708, is entirely different from s. 93. There is no obligation to register, no time limit or provision for extending that limit, and no penalty for non-registration. An unregistered deed is merely avoided against a subsequent purchaser who registers, and in effect the Act does nothing more than give priority by registration. The annuity section of the Judgments Act, 1855, falls a fortiori in the same category. It merely provides that an annuity "shall not affect" any lands as to purchasers, mortgagees, or creditors, unless and until registered. Both Acts were designed to protect a limited class, namely, purchasers of specific land, against secret incumbrances on that land, and the Courts held that purchasers with notice did not require that protection.

(1) (1887) 12 App. Cas. 371.

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Sect. 93 is quite different. Registration is obligatory. There is a time limit with a provision for extending it. Penalties are imposed in default of registration, and the security is avoided not merely against subsequent mortgagees of the same property who register, but against all creditors. It is no longer a case of losing priority against registered securities, it is a case of absolute avoidance against any creditor.

This class of registration is very analogous to registration under the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31). Sect. 8 imposed a time limit of seven days for registration and s. 14 enabled the Court to extend the time. Unregistered bills of sale were avoided against assignees in bankruptcy and execution creditors. This analogy is really recognized in *In re Joplin Brewery Co.* (1), *In re I. C. Johnson & Co.* (2), and *In re Ehrmann Brothers* (3), where the decisions on the extension section were applied. The rule in *Le Neve v. Le Neve* (4) does not apply to unregistered bills of sale: Reid on Bills of Sale, 13th ed. p. 230; *Edwards v. Edwards* (5); *In re Roberts*. (6) Nor does the rule apply to cases under 27 Eliz. c. 4.

The application of the rule to s. 93 would practically paralyse any dealing in mortgage debentures. No one could safely purchase a mortgage debenture for fear that some previous holder might have had notice of an unregistered prior charge.

Suppose the Court refuses to extend the time for registering a debenture. Surely every subsequent incumbrancer can ignore it. Otherwise notice would be equivalent to registration as against a subsequent incumbrancer with notice, and his assignee with or without notice. Sect. 93 would have to be read "shall be void against the liquidator and any creditor of the company 'other than a creditor with notice or his assignee.'" There is no justification for adding the latter words, and the inquiries involved would make s. 93 unworkable.

*Gerard M. Hildyard*, for the defendant Calway, adopted the same argument.

*Hon. Frank Russell, K.C.*, in reply. *Edwards v. Edwards* (5)

(1) [1902] 1 Ch. 79.

(2) [1902] 2 Ch. 101, 110.

(3) [1906] 2 Ch. 697, 710.

(4) 3 Atk. 646.

(5) (1876) 2 Ch. D. 291.

(6) (1887) 36 Ch. D. 196, 202.

was decided under the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), s. 1, and turned on the very strong words "null and void to all intents and purposes whatsoever," which were equivalent to "void in law and in equity." In the absence of such strong words in the Docketing Act, 1692 (4 & 5 W. & M. c. 20), s. 3, Lord Eldon held that an undocketed judgment was good against a purchaser with notice—*Davis v. Earl of Strathmore* (1)—and his observations are adopted in *Greaves v. Tofield*. (2)

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Even if we are wrong on the construction of s. 93 we contend that in the special circumstances of the present case the defendant Jenkins is under a personal disability or disqualification that debars him from retaining any benefit arising from the breach of his statutory duty in leaving the plaintiff's mortgage unregistered. There is no exact authority on this point, but an analogous principle is indicated in *Smith's Case* (3) and *Wright v. Horton*. (4)

*Sir Charles Macnaghten, K.C.*, in rejoinder. The Docketing Act, 1692, s. 3, merely provided that no undocketed judgment "shall affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in their administration of their ancestors, testators, or intestates estates." There was no provision for avoiding the judgment and the case evidently fell within the decisions on the Registry Acts.

The point as to the personal disability of the defendant Jenkins is based on a fallacy. He was under no statutory duty to register the plaintiff's mortgage. That duty is imposed on the company by s. 93, sub-s. 7. No doubt he or any other officer would have been liable to penalties under s. 99 if he was knowingly a party to his company's default or knowingly and wilfully authorized or permitted it. But that is not the case made. The point is clearly explained in *In re Globe New Patent Iron and Steel Co.* (5)

[ASTBURY J. I agree. It was an honest mistake all round. But can the defendant Jenkins now take advantage of it?]

(1) (1810) 16 Ves. 419, 428.

591, 597.

(2) 14 Ch. D. 563, 576.

(4) 12 App. Cas. 371, 373.

(3) (1879) 11 Ch. D. 579, 586, 588,

(5) (1878) 48 L. J. (Ch.) 295, 303.



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It is difficult to see why not. He gave the plaintiff a good mortgage. He was not legally responsible for its registration. He probably took his second debenture without any suspicion of the invalidity of the plaintiff's mortgage. He has only recently discovered its invalidity. What conceivable equity has the plaintiff to make him treat it as valid?

*Gerard M. Hildyard* in rejoinder. The personal disqualification (if any) of the defendant Jenkins does not bind the defendant Calway, as there is no proof that the defendant Calway had any notice of the circumstances raising that supposed disqualification: *Bainbrigge v. Browne* (1); Halsbury's Laws of England, vol. xiii., p. 78.

ASTBURY J., after stating the facts and pointing out that there was no suggestion that the omission to register the plaintiff's mortgage was done knowingly on the part of the defendant Jenkins or the company's advisers, and in fact there was little doubt that an innocent mistake was made by all parties to the transaction in the belief that a simple mortgage or charge upon and not for securing debentures did not require registration, continued:—The issue now to be determined is whether the plaintiff's 500*l.* mortgage has or has not priority or validity as against the claims of the defendants Jenkins and Calway under the second debenture. There is no issue of course as to the validity of the first debenture.

Sect. 93 provides that a mortgage or charge upon land shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company unless registered within twenty-one days, as therein provided. Sub-s. 7 enacts that it shall be the duty of the company to register the charge, although registration may be effected on the application of any person interested therein.

In *In re Cardiff Workmen's Cottage Co.* (2), a decision under the Companies Act, 1900, ss. 14, 15, Buckley J. stated that the purpose of the Act of Parliament in requiring registration within twenty-one days was to ensure the means of notice to those who contemplated giving credit to the company.

(1) (1881) 18 Ch. D. 188.

(2) [1906] 2 Ch. 627, 629.

The defendant Jenkins has not given evidence, and it is perfectly clear that he had full and complete notice of the plaintiff's mortgage. I also assume, in the absence of evidence to the contrary, that when he attested that mortgage he intended that it should form a first mortgage security upon the property therein comprised. The defendant Calway has been called, and I hold as a fact that he took his charge with full knowledge that the 500*l.* mortgage had been executed by the company, and in fact the only matter he did not know was the mortgagee's name.

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Now in the present case I have not to decide and I do not intend to decide any question as to the validity of the plaintiff's mortgage, either as against a liquidator, if one should be appointed, or as against any creditor other than the two defendants Jenkins and Calway, the only question I propose to decide being whether, as between the plaintiff on the one hand and the defendant Jenkins and his chargee on the other, the plaintiff has a valid and subsisting security or not.

Now there are a large number of statutes in which documents and transactions are declared to be void or of null effect in which the Courts as between particular parties have acted upon such an equity as is exemplified in *Greaves v. Tofield*. (1)

The Judgments Act, 1855, s. 12, provides that any annuity or rent-charge of the character referred to in the section "shall not affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute containing the name, and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the date of the deed, bond, instrument, or assurance whereby the annuity or rent-charge is granted" and so on, shall be left for registration in accordance with the section.

In *Greaves v. Tofield* (2) annuities were granted without registration, and Jessel M.R. held that the policy of the Legislature was so clearly expressed that he would, in his opinion, be repealing the Act if he were to decide the case in favour of the annuitant. The Court of Appeal, however, held, as stated in the

(1) 14 Ch. D. 563.

(2) 14 Ch. D. 565.

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head-note, that as the Judgments Act, 1855, s. 12, "was in similar terms to the clauses in the Registry Acts, which had been decided not to make an unregistered conveyance void as against a subsequent purchaser who had notice of it, the Legislature must be taken to have used the words in the later Act in the sense given to them by those decisions, and that the annuities therefore were valid as against all the subsequent incumbrancers who took with notice of them." James L.J. said (1): "Now, if an Act of Parliament uses the same language which was used in a former Act of Parliament referring to the same subject, and passed with the same purpose, and for the same object, the safe and well-known rule of construction is to assume that the Legislature when using well-known words upon which there have been well-known decisions uses those words in the sense which the decisions have attached to them." After referring to *Le Neve v. Le Neve* (2), where Lord Hardwicke came to the conclusion that the protection which was meant to be afforded by the Middlesex Registry Act was a protection against secret incumbrances, and that it never could have been the intention of the Legislature to put a man who had knowledge of a conveyance in the position of a man who was liable to be defrauded or injured by the existence of some secret dealings with the land, James L.J. continued (1): "In the case of *Davis v. Earl of Strathmore* (3) Lord Eldon expresses the principle of the decisions in very clear language, to the effect that those statutes"—i.e., the Registry Acts—"did not affect or take away the jurisdiction of Courts of Equity to enforce equitable rights depending upon contract, and in the case of contracts relating to land, as in all other contracts, equity enforced them, not only as against the man who entered into them, but as against his heirs, and against volunteers under him, and as against persons who took his estate with notice of the contract, or trust, or obligation, with which he had bound his estate." Later on he said (4): "The equitable right of any person who can affect the conscience of the purchaser or the owner of the lands remains the same as if this Act had not been passed." Baggallay L.J. agreed and Bramwell L.J.

(1) 14 Ch. D. 571.

(2) 3 Atk. 646.

(3) 16 Ves. 419.

(4) 14 Ch. D. 574.

said (1) : “ I understand the authorities further to establish this, that that principle is not affected by these Acts of Parliament which require registration in order to give or to prevent a priority, but that the conscience of the second purchaser, as I have called him, is equally affected, and that the intention of the Legislature in such Acts as those I have referred to was to afford a protection to persons whose consciences were not affected, and not to give the second purchaser whose conscience was affected an opportunity of joining in the commission of that which was a breach of contract and a wrong to the first person who made the bargain.”

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On the other hand there are authorities, of which *Edwards v. Edwards* (2) is an example, where this equity having regard either to the intention or language of the statute has been held not to apply. In that case, to which James and Baggallay L.JJ. were parties, it was held that a document which was in fact a bill of sale was invalid as against an execution creditor, who at the time his debt was contracted was aware and had notice of the bill of sale. That case was decided under the Bills of Sale Act, 1854, s. 1, which, after providing for registration, enacted that otherwise the bill of sale should as against assignees in bankruptcy and execution creditors be “ null and void to all intents and purposes whatsoever.” James L.J. said (3) : “ Both parties stood on their legal rights—neither of them was misleading the other. It is not consistent with the policy of the Legislature to import fine equitable distinctions into these cases, and I am therefore of opinion that the argument founded on the knowledge of the judgment creditor cannot prevail.” Mellish L.J. said (4) : “ Then it is urged that although this instrument, which was a bill of sale within the Act, was not registered, it is good against the execution creditor, because he had notice of it when his debt was contracted. Notice he clearly had, but does that take the case out of the Act? I am of opinion that at law it clearly would not be held to do so. . . . Then, is a Court of Equity to act differently? I agree with the Lord Justice James that we ought not to put such constructions on modern Acts of Parliament. If the

(1) 14 Ch. D. 577.

(2) 2 Ch. D. 291.

(3) 2 Ch. D. 296.

(4) 2 Ch. D. 297.



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Legislature says that a deed shall be 'null and void to all intents and purposes whatsoever,' how can a Court of Equity say that in certain circumstances it shall be valid? The Courts of Equity have given relief on equitable grounds from provisions in old Acts of Parliament; but this has not been done in the case of modern Acts, which are framed with a view to equitable as well as legal doctrines."

Four years after that decision James and Baggallay L.JJ. were parties to the decision in *Greaves v. Tofield* (1) to which I have already referred.

Now the Middlesex Registry Act, 1708, provides for the registration of memorials of deeds affecting lands in Middlesex in law or equity, and provides that every such deed that shall be made after the date referred to in the Act "shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial be registered as by this Act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim."

There have been a very large number of decisions under that Act, the tenor of which decisions is referred to in *Greaves v. Tofield*. (1)

I will take as an example *Ford v. White*. (2) The head-note states that "Property in Middlesex was mortgaged to A., and afterwards to B., and subsequently to C., with notice of B.'s incumbrance. C. registered before B. and afterwards assigned to D., who had no notice of B.'s mortgage. Held, that the interests being equitable, D. had no priority over B." The plaintiff in that case had an unregistered mortgage on the property in question, and the defendants were Parkes, who had a registered mortgage on the same property, subsequent in date to the plaintiff's, and his assignee Paget. Romilly M.R., after holding that Parkes took his mortgage with notice of the plaintiff's mortgage, said (3): "That being so, the next question is, what effect have the Registry Acts on the transaction? Nobody regrets more than I do the effect of the decisions which

(1) 14 Ch. D. 563.

(2) 16 Beav. 120.

(3) 16 Beav. 123.

have qualified the Act. The Legislature never intended that any notice should nullify it, the object being, that all incumbrancers should rank according to their priority on the register. The Court, however, has held, that where a person who obtains a security has notice of a prior incumbrance, it is inequitable to allow him to obtain priority over the first incumbrancer by the mere priority of registration. The decisions establish this, and they must not be departed from, otherwise many titles would be destroyed. The next question is, whether Parkes, by assigning his security for valuable consideration to other persons, who had no notice of the plaintiff's security, could put them in a better situation than himself. This is not the case of a person having the legal estate, for the incumbrances both of the plaintiff and Parkes are equitable, and persons taking an equitable security take it subject to all the equities which affect it." He decided that Parkes having taken with notice his assignee had no better title than Parkes himself. In the present case the question whether the notice to the defendant Jenkins affected his assignee Calway is immaterial, because I hold as a fact that the assignee himself had notice.

In coming to a conclusion which line of authority ought to be applied to the provisions of s. 93, there is an important passage in Lord Eldon's judgment in *Davis v. Earl of Strathmore*. (1) He said: "This Court, particularly in questions upon the Annuity Act,"—17 Geo. 3, c. 26, repealed by 53 Geo. 3, c. 141—"has acknowledged the distinction between Acts of Parliament, denying legal effect to certain instruments, and declaring them void to all intents and purposes; collecting from the more extensive words the inference, that the equitable, as well as the legal, jurisdiction was intended to be prohibited. Upon that express distinction the doctrine upon the Annuity Act has proceeded; as, if that Act had merely declared, that the instrument should be void, all the contract would still have remained; under which, though no interest passed, a right would have been created; giving this Court the power to interpose: but, the Act declaring the instruments void to all intents and purposes, and its policy requiring, that they should not be set up to any intent

(1) 16 Ves. 419, 428.

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or purpose, this Court refused by the exercise of its equitable jurisdiction to do what it had done upon the Registry Act."

In *Chadwick v. Turner* (1) this equitable doctrine was recognized by Turner L.J., where he says: "That the facts which are proved on the part of the defendants raise a strong suspicion of notice, cannot be denied, but I think that they fall short of what is required to affect a registered title, for which purpose the notice must be clear and distinct, and amounting in fact to fraud."

I am told that there is no decision upon this point under s. 93, and the sections in previous Acts to the same effect which preceded it, and the question whether s. 93 ought to be treated in *pari materia* with the Registry Acts and the Judgments Act, 1855, s. 12 (Annuities), in respect of this particular issue is one in my view of much difficulty.

It has been contended that of late years statutes providing for avoidance of documents in default of registration have been strictly construed, and reference has been made to the Bills of Sale Acts. Now, it is to be observed that in the Bills of Sale Acts avoidance of the documents in question is not only provided for in default of registration, but in default of their complying with other requirements.

A document amounting to a bill of sale which does not comply with these requirements apparently passes nothing whether registered or not, and it is not necessary, I think, for me to decide, or attempt to decide, anything as to the effect of non-registration of a bill of sale upon such an issue as has arisen in the present case.

It is no doubt extremely desirable that Acts of Parliament should be construed literally to mean what they say. It is also, in my judgment, equally desirable that people should not be entitled by relying upon technical objections to deprive others of securities for value with full notice of which they took their own security.

Now, in the present case there cannot be any doubt that the defendant Jenkins, as a managing director of this company, allowed the company to take the plaintiff's money, and intended

that she should have a valid and a first mortgage upon its property. In taking his second debenture, I have no doubt that he took it intending that it should be subject to the plaintiff's rights as mortgagee, and it is only now, after he has found out that the mortgage required registration under the Act, that he is attempting, by reason of the innocent default of the company of which he was managing director, to acquire a benefit, not for this company, but for himself.

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As far as the defendant Calway is concerned, taking as he did with notice of this pre-existing mortgage, and intending, no doubt, as Jenkins intended, that his security should be subject to it, I think the same remarks apply to him.

On the whole I think that I am bound, in the particular circumstances of this case, and having regard to the one narrow issue that I have to determine, to hold that the policy of registration provided for in s. 93 is of the same character as the policy of registration provided for in the Registry Acts. The Courts have held that, notwithstanding exactly similar language as to the avoidance of unregistered securities under the Registry Acts, persons who attempt to take advantage of such non-registration, for the purpose of avoiding securities of which they had full notice, shall be defeated, and in my judgment I ought in this case to decide, as I do decide, that the authorities under the Registry Acts should guide me rather than the authorities under the Bills of Sale Acts.

I therefore declare that the plaintiff is entitled to a charge on the lands and hereditaments referred to in her security in priority to any moneys due to the defendants Jenkins and Calway under and by virtue of the second debenture.

Another question has been argued, to which I will allude very shortly, which I do not intend to decide: whether, under the particular circumstances of this case, independently of the construction I have put upon the statute, the defendant Jenkins ought to be allowed to plead the statute, having regard to the default of the company of which he was managing director in not complying with its obligations to register the mortgage under the Act—in other words, whether he ought to be allowed to plead neglect of duty of his own company, for the purpose of



C. A. obtaining a benefit to himself. This is an interesting matter.  
 1915 The cases of *Wright v. Horton* (1) and *In re Globe New Patent  
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 MONOLITHIC not propose to decide the case upon this point.  
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The defendant Jenkins appealed. The appeal came on for hearing on February 25, 1915.

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*J. W. Manning*, for the appellant. The language of s. 93 of the Companies (Consolidation) Act, 1908, is clear and express that an unregistered mortgage on any land shall so far as any security on the company's property is thereby conferred be void against the liquidator and any creditor of the company. It would not be right to read into that section the qualification that such a mortgage shall not be void as against a creditor who has taken a subsequent charge with notice of the unregistered mortgage.

As was said by James L.J. in *Edwards v. Edwards* (3), "it would be dangerous to engraft an equitable exception upon a modern Act of Parliament." That was a bill of sale case. There is an analogy between s. 93 and the Bills of Sale Acts with reference to the extension of time for registration. Having regard to that analogy Buckley J. in *In re Joplin Brewery Co.* (4) introduced the practice of inserting in orders extending the time for registration of debentures under the Companies Act of 1900 a saving clause protecting rights acquired prior to actual registration. In *In re I. C. Johnson & Co.* (5) the Court of Appeal took the same view as to that analogy. That analogy ought to extend so as to include the proposition laid down in *Edwards v. Edwards*. (3)

In *Greaves v. Tofield* (6), which was a decision on the registration of annuities under 18 & 19 Viet. c. 15, it was held that that Act must be construed in the light of the old decisions as to notice; but *Edwards v. Edwards* (3) was not there cited.

It is said that the Registry Acts are more in *pari materia* with

(1) 12 App. Cas. 371.

(2) 48 L. J. (Ch.) 295.

(3) 2 Ch. D. 291, 295.

(4) [1902] 1 Ch. 79.

(5) [1902] 2 Ch. 101.

(6) 14 Ch. D. 563.

this Act than are the Bills of Sale Acts. But it is submitted that the contrary is the case. *Edwards v. Edwards* (1) was followed by Kay J. in *In re Roberts*. (2)

In *Wright v. Horton* (3), which was decided upon s. 43 of the Companies Act of 1862, debentures issued to a director and not registered in accordance with the Act were held valid as against unsecured creditors and debenture-holders as to whom it was not shown that they had made any inquiry as to the charges on the company's property or the existence of a register, but there it was held that the provision as to registration was merely directory, and the Legislature had not thought it right to render unregistered mortgages or charges invalid.

The question really turns upon the construction and effect of the statute. Commercial men, for the benefit of whom this section was passed, would be astonished to find that they must have regard to anything beyond the register.

If the qualification of notice be introduced it should apply to all persons mentioned in the section, and therefore why not to the liquidator? The Act deals with quite a different subject-matter to that dealt with by the Registry Acts. If the rule in *Le Neve v. Le Neve* (4) be imported into this section it would have to be read "a mortgage or charge on land shall be void against the liquidator and any creditor of the company other than a creditor with notice." Such a reading of the section is not justifiable and would render the section unworkable.

*Hon. Frank Russell, K.C.*, and *Lyttelton Chubb*, for the respondent. The view taken by Astbury J. is in accordance with all the authorities except *Edwards v. Edwards*. (1) In *Greaves v. Tofield* (5), which was decided upon the Judgments Act, 1855 (18 & 19 Vict. c. 15), s. 12, a purchaser with notice was postponed to an annuitant whose annuity was unregistered. That Act is in *pari materia* with s. 93. There was no suggestion of fraud as between the competing parties in that case. Bramwell L.J. assented with reluctance, feeling himself bound by the authorities.

(1) 2 Ch. D. 291.

(3) 12 App. Cas. 371.

(2) 36 Ch. D. 196.

(4) 3 Atk. 646.

(5) 14 Ch. D. 563.

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C. A. It is true that *Edwards v. Edwards* (1) was not cited there,  
 1915 but it may have been considered irrelevant. In *Davis v. Earl of*  
 MONOLITHIC *Strathmore* (2) a purchaser was held bound by a judgment not  
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*In re.* have an enactment that an unregistered document shall not  
 TACON affect lands, &c., that does not exclude the equitable doctrine of  
 v. notice. In order to do that stronger words are required, namely,  
 THE that the unregistered document shall be "void to all intents  
 COMPANY. and purposes whatsoever."

The Middlesex Registry Act, 1708 (7 Anne, c. 20), is much stronger. Upon that *Le Neve v. Le Neve* (3) was decided. That was a case of purely constructive notice. It is said that the decisions upon that Act are based upon the preamble, but the Act of 1908 might very well have had a similar preamble. Notwithstanding the strength of the words of that Act that unregistered deeds "shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration" we have the decision in *Le Neve v. Le Neve* (3) and all the other cases in which it was followed, including *Ford v. White* (4), cited by Astbury J. In that case Romilly M.R. thought the decisions were too strong for him, just as Bramwell L.J. did in *Greaves v. Tofield*. (5)

This view of the doctrine receives support from Lord Selborne in *Agra Bank v. Barry* (6), where he says that it is quite consistent with the policy of the Registry Acts that if a purchaser or his agent actually knows of the existence of prior unregistered instruments when he takes his own deed "he may be estopped in equity from saying that, as to him, they are fraudulent." Sect. 93 does not contain words strong enough to exclude the equitable doctrine of notice.

As to *Edwards v. Edwards* (1), the only case to the contrary effect, the words there were very strong—"null and void to all intents and purposes whatsoever." Again under the Bills of Sale Acts non-registration does not destroy the rights of the

(1) 2 Ch. D. 291.

(2) 16 Ves. 419.

(3) 3 Atk. 646.

(4) 16 Beav. 120.

(5) 14 Ch. D. 563.

(6) (1874) L. R. 7 H. L. 135, 157.

creditor—he can still take possession of the chattels. Different considerations apply to Acts dealing with mortgages of chattels or bills of sale. The older Acts which did not contain the strong words are more in *pari materia* with the Act of 1908 than are the Bills of Sale Acts. There is nothing in the Act of 1908 to destroy the equitable jurisdiction of the Court in such a case as this.

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As to the effect of a saving clause where the time for registration is extended, see *In re Ehrmann Brothers*. (1) Here there are only two competing incumbrancers, one registered and the other unregistered, and the latter is in the position to say to the former, “You had notice of my incumbrance when you took your own security, and are therefore in equity postponed to me.” [They also referred to *Lee v. Clutton*. (2)]

No reply was called for.

LORD COZENS-HARDY M.R. This is an appeal from a decision of Astbury J., and it raises a point which has never been authoritatively decided before. It is undoubtedly of importance, but counsel have not brought to light any authority which expressly decides the question before us. It turns really upon the true meaning of s. 93 of the Companies (Consolidation) Act, 1908. The facts which raise the point may be very shortly stated. The defendant company is a limited company subject to the provisions of that Act. It acquired some property in Hertfordshire, and executed a mortgage on March 3, 1913, in the ordinary form, for an advance of 500*l*. That was a mortgage to the plaintiff. That mortgage was not registered; it was registered afterwards, but not registered within the period required by the section. The omission to register was not due to any fraud; it was a common mistake of the advisers who thought that a mortgage on land did not require to be registered with the registrar. There was a first mortgage debenture subsequent to that, which was registered (that was granted to the plaintiff), and there was a second mortgage debenture, which was also registered. The fact that Jenkins, the defendant, had notice of everything that had taken

(1) [1906] 2 Ch. 697.

(2) (1875) 45 L. J. (Ch.) 43.



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place is quite clear. I never came across a case in which notice was so clearly proved. He was the managing director of the company, he had witnessed the execution of the deed, and I think was the person who affixed the company's seal, so that Jenkins had the clearest possible notice of the plaintiff's mortgage. I should add—and this is all I need say about it—that subsequently, on March 27, 1914, three days before the writ in this action was issued, an order of the Court was made extending the time for registering the plaintiff's mortgage until April 17, 1914, and that order was made without prejudice to the rights of the parties prior to the time when the mortgage was actually registered.

I propose to consider the language of s. 93 without having my mind influenced for the moment—I had almost said without having my mind poisoned for the moment—by consideration of any authorities or other Acts dealing with this question. This was a mortgage on land executed by a company, and s. 93 says : [The Master of the Rolls read the section and continued :] Mr. Jenkins, of course, was the creditor of the company in respect of his registered debenture. That is quite plain. This section says that so far as any security under the property comprised in the unregistered mortgage is concerned it is to be void against the liquidator, and any creditor of the company unless registered within this period. What does that mean ? I confess my inability to see that it means anything else than exactly what it says, namely, that it is void against any creditor who has a registered charge on the company's property. I cannot myself see any reason to doubt that, as a matter of construction of this section. It is void also against the liquidator in the event of winding up, but that is a contingency which we need not consider here, and which might give rise to certain questions which have been stated and discussed in argument, but as to which I deliberately refrain from expressing an opinion. I only propose to deal with this case in reference to the difference of position between a registered secured creditor and a prior unregistered secured creditor. It is said that we ought to read s. 93, contrary, as it seems to me, to its construction and intent, as saying an unregistered mortgage shall be void against any creditor of the company except where he has had notice of its existence. I ask why ?

Notice is not material in the case of a creditor. I feel the greatest possible difficulty in saying that that doctrine can apply. I put aside altogether any question of fraud. The doctrine of the Court in a case of fraud, of course, proceeds upon a different footing, and any security may be postponed if you can find fraud in its inception. But it is not fraud to take advantage of legal rights, the existence of which may be taken to be known to both parties. We are dealing with a case where there is a common seal. Then we are asked to go back 170 years, to *Le Neve v. Le Neve* (1), and to consider the decisions under the Middlesex Registry Act, and certain other Acts under which it was held that there might be such an equity as would induce the Court to say that an unregistered charge should not be postponed to a registered charge.

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In the first place, the language of the Middlesex Registry Act seems to me to be materially different. The preamble to the Act (7 Anne, c. 20), which is found in s. 1, is framed in this way: "Whereas by the different and secret ways of conveying lands, tenements, and hereditaments, such as are ill-disposed have it in their power to commit frauds, and frequently do so, by means whereof several persons (who through many years industry in their trades and employments, and by great frugality, have been enabled to purchase lands, or to lend moneys on land security) have been undone in their purchases and mortgages by prior and secret conveyances and fraudulent incumbrances, and not only themselves, but their whole families thereby utterly ruined," and it then provided that deeds not registered should be adjudged fraudulent or void against any subsequent purchaser for valuable consideration.

In the great case of *Le Neve v. Le Neve* (1), where there was a solicitor who had been really concocting a scheme by which the children of a first marriage should be defrauded and deprived of their security by means of a second marriage settlement on the second marriage, Lord Hardwicke held that notice to the solicitor was notice to the second wife, and that in some respects she was affected by his fraudulent conduct. But I do not think it would be correct to say that Lord Hardwicke's decision went simply

C. A. upon the actual fraud in the concoction and carrying through of  
 1915 the arrangement. That decision, and the decisions which have  
 MONOLITHIC followed it, have, certainly for the last half-century,—it may be  
 BUILDING for longer—been strongly dissented from by the Courts, and have  
 COMPANY, been followed with great reluctance by judge after judge. But  
*In re.* those judges felt themselves not at liberty—in dealing with the  
 TACON Registry Act on which this decision had been given, and on the  
*v.* interpretation of which many decisions had doubtless depended—  
 THE to override Lord Hardwicke's decision, and they have in many  
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I fail to see the reason why we should apply that principle to a section of a modern Act of Parliament, namely, s. 93, which I have read.

Then it is said that the Court of Appeal in the case of *Greaves v. Tofield* (1), in the year 1880, really adopted the same principle. It is necessary to consider that case. It arose on the construction of s. 12 of the Judgments Act, 1855, which says: "And whereas by reason of the repeal in the last session of Parliament of the Act of the fifty-third year of King George the Third, chapter one hundred and forty-one, requiring the enrolment of life annuities or rent-charges, purchasers are no longer enabled to ascertain by search what life annuities or rent-charges may have been granted by their vendors or others: Be it therefore enacted by the authority aforesaid as follows: Any annuity or rent-charge granted after the passing of this Act, otherwise than by marriage settlement, for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, shall not affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute containing the name, and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby"—and other particulars—"shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the particulars aforesaid in a book." The words there are "estates intended to be affected thereby," and it was held in the Court of Appeal by James L.J., Mellish L.J., and Baggallay L.J. that that did not apply where

(1) 14 Ch. D. 563.

there was notice of an unregistered deed. But I personally do not feel much difficulty about that case for this reason : if you look at it that section was the last section of an Act, in several sections of which it was expressly said certain consequences shall follow notwithstanding any notice. Sect. 4 says "that no judgment . . . shall affect any lands, tenements, or hereditaments, at law or in equity, as to purchasers, mortgagees, or creditors, unless and until such a memorandum or minute as in the said Act in that behalf mentioned shall have been left with the proper officer of the proper Court, any notice of any such judgment, decree, order, or rule to any such purchaser, mortgagee, or creditor in anywise notwithstanding." If you go to s. 5, which deals with protections against judgments not registered, it is again provided, "so that notice of any judgment, decree, order, or rule, not duly re-registered, shall not avail against purchasers, mortgagees, or creditors." Sect. 10 says that no order of the Court of Bankruptcy shall affect lands unless it is registered, "any notice of any such order to any such purchaser, mortgagee, or creditor in anywise notwithstanding." Then you come to s. 12, in which there is a remarkable omission of any reference to the absence of notice. In those circumstances the Court held, differing from Sir George Jessel in the Court below, that there was no contradiction in that case under s. 12, and that the fair meaning of that section was that the old equitable doctrine which had been applied in these matters for many years was deliberately not intended to extend to a section excluding those words which were correctly inserted in ss. 3, 4, and 5. Whether that was or was not sufficient to justify the decision I cannot say, but it certainly was a point in the case which distinguishes it from the present case. But is that the only case we ought to consider? I think not. There is another decision of this Court, *Edwards v. Edwards* (1), under the Bills of Sale Act, a modern Act, where it was argued that an unregistered bill of sale ought to be held good as against a judgment creditor who had notice of its existence, and *Le Neve v. Le Neve* (2) was cited. James L.J., before referring to the language of the Bills of Sale Act, said: "I think it would be dangerous to engraft an equitable exception upon a modern Act

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(1) 2 Ch. D. 291, 295, 297.

(2) 3 Atk. 646.



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of Parliament. The Act provides that a bill of sale shall be registered within twenty-one days, 'otherwise such bill of sale shall as against all sheriffs' officers and other persons seizing any property or effects comprised in such bill of sale, in the execution of any process of any Court of Law or Equity authorizing the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale.'" Then a little lower down he says: "The mortgagee says to the execution creditor, 'You are not prejudiced, for you knew of my security.' The execution creditor replies, 'I knew that you had a security, but you knew the law as well as I. You knew that if I issued execution your security would be of no avail as to chattels of which you had not taken possession. I knew that my remedy against those chattels was liable to be defeated by your taking possession before I seized them in execution. You knew that your security was liable to be defeated by my taking them in execution before you took possession. Both parties stood on their legal rights—neither of them was misleading the other. It is not consistent with the policy of the Legislature to import fine equitable distinctions into these cases, and I am therefore of opinion that the argument founded on the knowledge of the judgment creditor cannot prevail.'" Mellish L.J.'s judgment is, if possible, still more in point. He says: "Then it is urged that although this instrument, which was a bill of sale within the Act, was not registered, it is good against the execution creditor, because he had notice of it when his debt was contracted. Notice he clearly had, but does that take the case out of the Act? I am of opinion that at law it clearly would not be held to do so." Then lower down he says: "Then, is a Court of Equity to act differently? I agree with the Lord Justice James that we ought not to put such constructions on modern Acts of Parliament. If the Legislature says that a deed shall be 'null and void to all intents and purposes whatsoever,' how can a Court of Equity say that in certain circumstances it shall be valid?

The Courts of Equity have given relief on equitable grounds from provisions in old Acts of Parliament;”—obviously referring to the Registry Acts—“but this has not been done in the case of modern Acts, which are framed with a view to equitable as well as legal doctrines.”

Now can any distinction be drawn because that Act says that the deed shall be “null and void to all intents and purposes whatsoever”? If a deed is said to be void against the first and second incumbrancers, what is added by saying that it shall be void to all intents and purposes? Of course the deed is not void to all intents and purposes. It is a perfectly good deed against the company so long as it is a going concern. It is not void to all intents and purposes, but it is void as between the two incumbrancers. It is rather strange, but *Edwards v. Edwards* (1) was not cited in *Greaves v. Tofield*. (2) I have difficulty in distinguishing the principle which guided the Court in those two cases unless the distinction is based upon those two sections to which I have referred. As between those two decisions I certainly prefer *Edwards v. Edwards* (1), and I think the principle of the old equitable doctrine laid down in *Le Neve v. Le Neve* (3), and subsequent cases which have followed it, ought not to be applied or extended to modern Acts of Parliament.

For those reasons I think the decision of the learned judge below was wrong, and that this appeal ought to be allowed.

PHILLIMORE L.J. I am of the same opinion.

No case of fraud was made against the defendant Jenkins, and we need not consider, and cannot consider, whether or not the plaintiff has any remedy against him for negligence or misconduct in his independent office of director of this company. We have to construe s. 93 of the statute. It makes void a security; not the debt, not the cause of action, but the security, and not as against everybody, not as against the company grantor, but against the liquidator, and against any creditor, and it leaves the security to stand as against the company while it is a going concern. It does not make the security binding on the liquidator as successor

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of the company. There are three ways in which documents, or three degrees to which instruments, may be void. They may be void altogether, like a bill of sale under 30*l.* under the Bills of Sale Act, 1882; they may be void as to the security and good as to the obligation; and they may be void against certain parties only; but in each of those cases they are quoad a particular transaction void, and the matter is not made stronger by saying "to all intents and purposes" or any phrase of that kind.

Now it is suggested here that the defendant's knowledge of the plaintiff's mortgage precludes him from insisting upon his rights as a registered holder of debentures. I answer in the terms of *Edwards v. Edwards* (1), which has been already quoted by the Master of the Rolls, but which I must just briefly read because I am not going to put any other answer in my own language. "The mortgagee says to the execution creditor, 'You are not prejudiced, for you knew of my security.' The execution creditor replies, 'I knew that you had a security, but you knew the law as well as I.'" I omit the next words, because they have been already cited. "Both parties stood on their legal rights—neither of them was misleading the other." That is this case as the facts have been found. The difficulty in our way is the case of *Greaves v. Tofield*. (2) As to *Greaves v. Tofield* (2) three explanations may be given for it, any one of which will let it stand with the principle laid down in *Edwards v. Edwards*. (1) *Greaves v. Tofield* (2) was decided on the ground that there was the same phrase in that Act as in the Act of William and Mary. "Shall not affect any lands or tenements" is the Act of 18 & 19 Victoria. "No judgment not docketed shall affect any land or tenements," says the Act of William and Mary, upon which the decision in *Davis v. Earl of Strathmore* (3) was given, the case which has been followed ever since. That is the first observation to make. Secondly, the mischief in each Act is recited in the same way, as also in the Act of Anne. It is the mischief that the second incumbrancer or purchaser will be deceived by absence of knowledge of the first, a mischief which cannot ensue if he knows. I omit the subtleties of constructive notice for this

(1) 2 Ch. D. 291, 295.

(2) 14 Ch. D. 563.

(3) 16 Ves. 419.

purpose. It cannot arise if he in fact knows. The third point is that which the Master of the Rolls has already referred to, that when in that Act it was intended that knowledge or notice should prevent a subsequent purchaser or incumbrancer from relying on non-registration, it was so stated in three other sections, but no such statement was made in the section under consideration in that case. On these grounds it seems to me that *Greaves v. Tofield* (1) may well stand as a decision—and we cannot overrule it—upon the particular Act of Parliament without being in any way in conflict with the broader language of *Edwards v. Edwards*. (2)

Now what principle do the respondents in this case contend for? There are only two ways in which this matter can be put. The first is, that the object of registration is to prevent people advancing money or purchasing in the dark. It is in order that people who do not know shall not be affected by a prior assurance. If they do know the mischief disappears, and therefore although there is no such phrase in the Act it does not apply to such cases. The other is on a different principle. The other makes the subsequent incumbrancer trustee for the first incumbrancer, and that is the view in *Le Neve v. Le Neve* (3), which Lord Hardwicke puts upon *dolus malus*, and what he calls (quoting from the civil law) “*machinationem ad circumveniendum*.” In the particular case there was that very thing. If B. knows of an incumbrance on Black Acre already effected in favour of A., he may take a second incumbrance without intending to destroy A.’s incumbrance, when he takes it thinking that there will be sufficient for both, and when he finds that there will not be sufficient for both he may effect registration of his incumbrance knowing that the other has not been registered, with a view to getting as much advantage as he can. There is no fraud in that. He is standing on his legal rights. But if A. has a conveyance of the whole property, and B. takes a second conveyance of the whole property, knowing that A.’s is not registered, and promptly registers, then his endeavour from the beginning has been to destroy that which he knows was an honest transaction though

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(1) 14 Ch. D. 563.

(2) 2 Ch. D. 291.

(3) 3 Atk. 646, 654.



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not protected by law. It is the same of course if, knowing that A. has a conveyance of the whole property, he takes a mortgage which partially affects A., or if, A. having a mortgage, B. takes a conveyance which will defeat A.'s mortgage, and that is what happened in *Le Neve v. Le Neve*. (1) It was not that the registration was effected in order to gain an advantage. It was that the whole inception of the transaction was to create an assurance which would defeat what the party intending to defeat it knew was an honest transaction. In such a case, I assume that the manner in which the matter would be worked out would be by making the second person trustee of his advantages in favour of the first where there are third persons to be considered; but if there are none, all that need be said is that the second person is postponed to the first because he must be taken to have known of the first all along. The way of working out an administration of the assets if there was a liquidation, and if there were other creditors coming in, would be, it seems to me, difficult in both those cases, and extremely difficult in the case where, as in this case, there was no fraud at all.

On all these grounds it seems to me that the best thing is to go to the plain words of the statute. This document as against any creditor is void. The defendant here is a creditor, and therefore as against him it is as if it did not exist. Let us not import considerations which may be applicable, or which it might be desirable to make applicable, where there is *dolus malus*, but which in any other case neither are applicable, nor should be made applicable.

Therefore I agree that this appeal should be allowed.

JOYCE J. This appeal, it appears to me, raises an important general question, and that is whether a creditor, in this case a secured creditor, who at the time of his debt being contracted, or of his taking his security, had notice of a prior unregistered security on the company's property, is thereby precluded from setting up s. 93 of the Companies (Consolidation) Act, 1908, against such prior security.

Now in my opinion it would be most unfortunate, and lead to

endless difficulty and confusion, if the decision of the Court below in this case were to stand. We have to consider the plain, or certainly tolerably plain, words of that recent Act of Parliament. There is a saying of Parke B. (1), with reference to the construction of Acts of Parliament, which I should like to cite: "It is our duty to construe the statute according to the grammatical meaning of the words, unless some absurdity would ensue from so construing it, or a uniform series of decisions had already established a different construction. I do not think any of the cases cited of sufficient weight to preclude us from putting our own construction on the words of the statute." There are also some observations of Sir George Jessel, very similar to what we constantly hear about the construction of wills, in *Ex parte Blaiberg* (2), which was a bill of sale case. He says: "Whatever view we take of this case the result will be a singular one, and one which was probably not contemplated by the Legislature. I think the proper course is to read the section of the Act and to ascertain its meaning, and not to trouble ourselves about decisions upon the former Act. Any other course would be apt to lead us astray. If the later Act can have only one meaning we ought to give effect to it accordingly. If instead of doing that we compare it with the former Act, and say that it differs from it only to such and such an extent, and then consider the decisions upon the former Act, we might in that way go back to half a dozen older Acts, and after considering the decisions on them, we might at last arrive at a conclusion exactly contrary to the later Act."

Now this is a modern Act. I will not read again what the Master of the Rolls has read from Mellish L.J.'s judgment, which has never been questioned or criticized in any respect, but those observations in his judgment are to my mind very much in point in this case. I think that before getting lost in any wilderness of authorities, or a multitude of exceptions, we ought to look at the Act itself, and I think the Act is perfectly plain. The Act itself does not say that any charge shall be void altogether, but it specifies in the most precise and complete manner—it takes several lines to do it—it prescribes

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(1) 10 M. &amp; W. at p. 521.

(2) (1883) 23 Ch. D. 254, 257.

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in the most precise and particular manner the extent to which the other charges are to be avoided. Upon that specification the respondents seek to set up a qualification, or rather to insert an exception among the creditors. They want to insert the following exception from the creditors there mentioned: "with the exception of creditors who have notice of the prior charge." Having regard to that contention, it is important to remember that the statute avoids the charge as against the liquidator. Now he of all persons is the person who has notice. The company, and he represents the company, has notice of the charge. If the unregistered charge is to be void as against him, I, myself, have great difficulty in seeing what would be the sense of making it not void as against some other creditors, and I should also have great difficulty in seeing how the matter would work out if we assented to the construction sought to be placed on this section by the respondent. I have great difficulty in seeing how it would work out in a winding-up. Practically, in my opinion, it would be unworkable, and, for my own part, I could not sanction the engrafting on these plain words of the Act a very ingenious limitation, which in the result would render this section unworkable and absurd. I think the section means exactly what it says, and that it is not subject to any such exception as has been suggested by the respondent in this appeal.

Solicitors: *C. Beaumont Cottam; Farrar, Porter & Co., for Bertram R. Yorke, Eye, Suffolk.*

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*In re* RAVEN.

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SPENCER *v.* THE NATIONAL ASSOCIATION FOR THE  
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OF TUBERCULOSIS AND REGINALD PRATT.1915  
March 5.

[1914 R. 1024.]

*Will — Construction — Charitable Legacies — Declaration that Trustee shall decide any Question of Disputed Identity — Jurisdiction of Court — Latent Ambiguity — Evidence of Intention.*

Testator gave certain charitable legacies—including a legacy of 1000*l.* to The National Association for the Prevention of Consumption”—and the testator directed that “if any doubt shall arise in any case to the identity of the institution intended to benefit the question shall be decided by my trustees whose decision shall be final and binding on all parties.” There was no society of that name merely, but there was a society whose full name was “The National Association for the Prevention of Consumption and other Forms of Tuberculosis.” There was also an independent branch of this association whose full name was “The Leicester and Leicestershire Branch of the National Association for the Prevention of Consumption and other Forms of Tuberculosis” to which the testator had been a subscriber and in whose favour extrinsic evidence of intention was sought to be given. Both the trustees and the Leicester and Leicestershire Branch were desirous that the question of identity should be finally decided by the trustees. The National Association insisted on having the decision of the Court:—

*Held*, that the direction in the will so far as it purported to oust the jurisdiction of the Court was void and inoperative (1.) on the ground of repugnancy and (2.) as being contrary to public policy.

*Massy v. Rogers* (1883) 11 L. R. Ir. 409 approved and followed.

*Held*, also, that extrinsic evidence of intention was inadmissible and that the National Association was entitled to the legacy.

## ADJOURNED SUMMONS.

William Raven, of Leicester, hosiery manufacturer, who died on January 9, 1914, by his will dated September 29, 1911, appointed Charles Henry Spencer, of Leicester, chartered accountant, and his sons, William John Raven and Horace George Raven, his executors and trustees. Clause 13 of the will was as follows: “I bequeath the following charitable legacies free of all duties, that is to say,

“(1.) To the Leicester Infirmary 1000*l.*;



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“(2.) To the National Association for the Prevention of Consumption 1000l.;

“(3.) To the Leicester and Leicestershire Maternity Hospital now or formerly connected with the Leicester and Leicestershire Provident Dispensary 500l.;

“(4.) To the Unitarian Church meeting for worship at the chapel known as the Great Meeting situate in Bond Street Leicester 500l. to be applied for such purposes as the vestry connected with the said chapel direct;

“(5.) To the Leicester Association for Promoting the General Welfare of the Blind 250l.;

“(6.) To the Leicester Guild of the Crippled 250l.;

“I direct that the receipts of the respective treasurers for the time being of the before mentioned charitable institutions and Great Meeting (or such other officer or officers thereof as my trustees shall think fit to pay the money to) shall be good discharges for the said legacies, and if any doubt shall arise in any case to *[sic]* the identity of the institution intended to benefit the question shall be decided by my trustees whose decision shall be final and binding on all parties.”

The question arose on the second of these legacies. There was no society whose name was merely “The National Association for the Prevention of Consumption,” but there was a society incorporated in 1899 whose full name was “The National Association for the Prevention of Consumption and other Forms of Tuberculosis,” whose office was at 20, Hanover Square, London. This association had power to constitute branches, and amongst other branches there was an unincorporated branch whose full name was “The Leicester and Leicestershire Branch of the National Association for the Prevention of Consumption and other Forms of Tuberculosis.”

The legacy of 1000l. was claimed on behalf of each of these charities, which for this purpose were completely independent institutions.

It appeared that the testator had been a subscriber to the Leicester and Leicestershire branch for some years prior to his death, and had not subscribed to the National Association itself. Extrinsic evidence of intention was also offered for the purpose

of showing that the Leicester and Leicestershire branch was the charity intended to be benefited by the testator.

The trustees of the will were desirous of deciding the question if they had power so to do, in which they were supported by the treasurer of the Leicester and Leicestershire branch. The National Association on the other hand insisted that the question should be decided by the Court.

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Under these circumstances the trustees took out this originating summons against the National Association and the treasurer of the Leicester and Leicestershire branch as defendants for the determination (1.) of the question whether they had power to decide whether the legacy in question was intended for the benefit of the National Association or for the benefit of the Leicester and Leicestershire branch, and whether their determination of the question would be final and binding both on the National Association and on the Leicester and Leicestershire branch; and (2.) if it should be determined that the trustees had no such power, then that the question might be determined by the Court. On the first point,

*Hughes, K.C.*, and *A. Adams*, for the trustees. The legatees take subject to the terms of the will and cannot object to the determination of the question by the trustees, a doubt having clearly arisen as to the identity of the legatee and the trustees being willing and desirous to exercise their power. The precedent books contain common forms conferring similar or analogous powers upon executors or trustees relating to specific bequests and the like, all of which involve taking property from one person and giving it to another: *Davidson's Precedents*, 2nd ed. vol. iv. pp. 46, 203; *Key and Elphinstone's Precedents*, 10th ed. vol. ii. pp. 930, 950, n. Powers of maintenance and discretionary trusts to apply income in favour of such one or more of a class as trustees think fit are examples of the same character. *Massy v. Rogers* (1) may be cited against us, but the first proposition stated in the head-note to the report of that case was not necessary for the decision and goes too far. The subject was also discussed in *In re Thompson*. (2) The gift in the present case is

(1) 11 L. R. Ir. 409.

(2) (1910) Victorian Law Rep. 251.

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a gift sub modo. The direction is not repugnant to but a qualification of the original gift. Assuming that the trustees have the power, it is immaterial that in exercising it they may take into consideration circumstances which would not perhaps be taken into consideration by the Court itself. The real effect of the gift may be to give a power of selection to the trustees, but there is no objection to that. [They also cited *Steff v. Andrews*. (1) ] *Coldridge, K.C.*, and *MacSwinney*, for the treasurer of the Leicester and Leicestershire branch, supported the same argument. There must be a reasonable doubt about identity so as to give rise to the power conferred upon the trustees, but subject to the existence of that doubt—which is not disputed to exist in the present case—all analogy is in favour of supporting the right of the trustees to determine the question. For instance, the power in the present case involves no greater interference with the legatee's rights than the common instance of a discretionary power given to trustees to settle a daughter's share. The testator in *Charter v. Charter* (2) named a private individual to be the arbiter of proper allowances to be made to his widow, and Lord Cairns L.C. quotes that passage of the will in his speech without expressing any doubt as to its validity.

*Tomlin, K.C.*, and *J. W. Manning*, for the National Association, were not called on.

WARRINGTON J. The testator bequeathed certain charitable legacies and amongst them a legacy of 1000*l.* to the "National Association for the Prevention of Consumption." He then inserts this direction: "If any doubt shall arise in any case to"—meaning of course "as to"—"the identity of the institution intended to benefit the question shall be decided by my trustees whose decision shall be final and binding on all parties." It is said that in this case a doubt has arisen whether the legacy in question ought to be given to one institution or another. The trustees desire to decide the question finally if they have power so to do. Of the two institutions between whom it is said that a doubt exists, one desires that the trustees should decide

(1) (1816) 2 Madd. 6.

(2) (1874) L. R. 7 H. L. 364, 379.

and the other desires—and this is the important point—to have the question determined by the law of the land, that is to say, by the King's Courts administering the law. The question is whether the alleged legatee,—I try to use some expression that shall be entirely without prejudice—or the institution which claims to be the legatee, is debarred from having the decision of the Court on the question because the testator has inserted this direction in his will. In my opinion it is not competent for a testator to confer certain legal rights by giving legacies and at the same time to say that the question whether that legal right is or is not to be enjoyed is not to be determined by the ordinary tribunal—in other words, it is not competent for him to deprive the person to whom that legal right is given of one of the incidents of that legal right; and if necessary I should be prepared to rest my decision upon the ground that the attempt to do so is an attempt to do two inconsistent things. In my opinion the gift of a legacy to a legatee, even if it be of doubtful construction, is in fact a gift to the person who shall be determined to be the legatee according to legal principles, and to give effect to a provision such as the provision which the testator has inserted in his will in the present case is in fact to assert the direct contrary and to say that the gift is not to the person who shall be determined to be the legatee by the Courts which administer the legal principles to which I have referred, but to the person who shall be decided to be the legatee by the trustees, who by the will are unfettered and may make their decision upon such grounds as they think fit. I think therefore that I can safely decide the point on that ground alone; but I also think that I may and ought to decide it on wider grounds, namely, that it is contrary to public policy to attempt to deprive persons of their right of resorting to the ordinary tribunals for the purpose of establishing their legal rights. That particular point has been decided in Ireland in a case the judgment in which though not binding on me is certainly in accordance with my own opinion, and, even if it were not, is still one to which I should pay the greatest respect. I refer to the decision of Chatterton V.-C. in *Massy v. Rogers* (1), which seems to me

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(1) 11 L. R. Ir. 409, 416, 417.



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to be exactly in point in the present case. The head-note to the report on this particular matter is, "A testator cannot, by constituting private individuals a forum domesticum to decide whatever questions may arise upon the construction of his will, oust the jurisdiction of the Court to determine such questions." The power conferred on the trustees by the testator in that case was in these terms: "I have now stated my will, to the best of my ability, clearly as to the disposal of my different properties; yet, in order to prevent disputes, I shall add this clause: And it is my will that all differences of opinion as to my intentions"—that means as to the proper construction to be attached to his will—"shall be left to the decision of the executors, whose decision shall be final if they agree; and if they do not, they shall appoint an umpire, from whose judgment there shall be no appeal." The Vice-Chancellor said this: "The testator has attempted to reserve for the decision of his executors as a forum domesticum all questions upon the construction of his will, and to oust the jurisdiction of the ordinary tribunals to deal with them. His power to do so is contested as being against the policy of the law. This is not the case of a discretion being vested in the executors, as in *Gisborne v. Gisborne* (1), *Tabor v. Brooks* (2), and other similar cases, to apply the personal estate without control to particular purposes with which, in the absence of fraud, this Court cannot interfere. In such cases no question of public policy exists. Here the authority which the testator desires to vest in his executors is one which the law entrusts to Her Majesty's Courts, which must be freely open to all her subjects. The testator appears to have considered, whether rightly or wrongly, that it would be for the advantage of his legatees that their mutual rights under his will should be necessarily submitted to a private tribunal constituted by himself. No case has been cited where such a condition was given effect to, even as to real estate, or as to personal estate with a gift over on breach of the condition." Then he refers to the rules applicable to cases of contract, that is to say, that according to common law, independent of the statutes such as the Common Law Procedure Act and the Arbitration Acts, the

(1) (1877) 2 App. Cas. 300.

(2) (1878) 10 Ch. D. 273.

parties to a contract cannot oust the jurisdiction of the ordinary Courts. They may, of course, make the decision of some tribunal, some individual, not being one of His Majesty's Courts, a condition precedent to the commencement of an action for recovery of money; that is another thing altogether; but if once the contract gives a legal right it is not competent at common law for the parties to the contract to oust the jurisdiction of the Courts. Having dealt with that part of the case, the Vice-Chancellor goes on: "What the parties to a contract cannot be permitted to effect by stipulation cannot, in my opinion, be effected by a testator in his will. The only mode in which conditions or provisoes in a will can be made effectual is by election. A legatee or devisee cannot take under a will and against it; if he takes under it, he must conform to its conditions and submit to its provisoes. But I cannot hold that by this method any proviso or restriction contrary to the policy of the law can be enforced, any more than it could be by express stipulation in a contract. Certain rights are claimed under a will, the existence of which do not depend on the fulfilment of any condition precedent, or upon any ascertainment by a prescribed method. The nature and extent of these rights is the subject of controversy, but the rights are there, and the policy of the law is that they shall be ascertained by the constituted tribunal. Every subject of the realm is entitled to free access to those tribunals, to ascertain, establish and enforce the rights which the law gives him, whether arising upon contract, or upon testamentary disposition. In my opinion, any attempt to exclude this right is unlawful and inoperative." It seems to me that that statement of the law exactly applies to the present case. In the present case, as in the case before the Vice-Chancellor, certain rights are claimed, namely, the right to be treated as the legatee, the existence of which does not depend upon the fulfilment of any condition precedent or upon anything to be ascertained by a prescribed method. It has been attempted to say that the gift is equivalent to a gift to such institution as the trustees shall select. In my opinion that is not the effect of this gift. The gift of this legacy is to a particular institution, and that institution, if it proves its right, is entitled to the legacy and is not in the position of

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having to fulfil any condition precedent; nor does the right depend on ascertainment by any prescribed method; the right is ascertained by the gift itself. That being so, it seems to me impossible for the testator to qualify that gift by providing that the right to the legacy, the subject of the gift, shall be determined by some tribunal other than that of the country. In my opinion, as Chatterton V.-C. held in *Massy v. Rogers* (1), the provision in this case is unlawful and inoperative, and therefore the question so far as there is a question between the two claimants must be decided in the ordinary way.

The second question raised by the summons was then argued.

*Tomlin, K.C.*, and *J. W. Manning*, for the National Association. The legacy is in terms given to the National Association and not to the Leicester and Leicestershire branch. The National Association was known to the testator.

[They were stopped.]

*Coldridge, K.C.*, and *MacSwinney*, for the treasurer of the Leicester and Leicestershire branch. The surrounding circumstances are sufficient to show that the testator intended the branch and not the National Association itself. The testator was a Leicester man of business and had subscribed to the branch; and the other five charities mentioned in clause 13 of the will are all connected with Leicester. [They cited *National Society for the Prevention of Cruelty to Children v. Scottish National Society for the Prevention of Cruelty to Children* (2).] Moreover, there is in the present case a latent ambiguity or equivocation in the description which renders parol evidence of intention admissible: Wigram on Extrinsic Evidence, 5th ed. pp. 110, 143, proposition 7; *In re Wolverton's Mortgaged Estates* (3); and the parol evidence in the present case if admissible is decisive.

WARRINGTON J. I feel no doubt at all how this question should be determined. The testator has given a legacy of 1000*l.* to the National Association for the Prevention of Consumption. There

(1) 11 L. R. Ir. 409.

(2) [1915] A. C. 207, 211, per Earl Loreburn.

(3) (1877) 7 Ch. D. 197.

is a corporate society called the National Association for the Prevention of Consumption and other Forms of Tuberculosis. If there were no more in the case than that, there could be no possible doubt that the testator meant to give the legacy to that society, in other words the testator has used a description which indicates without doubt his intention to give the legacy to the National Association for the Prevention of Consumption and other Forms of Tuberculosis. It is said, however, that the legacy is not given to the National Association for the Prevention of Consumption and other Forms of Tuberculosis because that society has a number of branches and one of the branches is established in Leicester and Leicestershire, where the testator lived, and is known as the Leicester and Leicestershire Branch of the National Association for the Prevention of Consumption and other Forms of Tuberculosis. It is plain, however, that the testator has in terms given the legacy to the National Association itself and not to a branch of the association. Then it is urged that there is such a latent ambiguity in the testator's language that I ought to admit evidence of actual intention outside the will altogether, and that, if that evidence is admitted, it is quite clear that the testator meant to give the legacy to the branch and not to the association. In my opinion extrinsic evidence of intention according to the rule stated in Wigram on Extrinsic Evidence can only be admitted where there is a description applying indifferently to more than one person or society, while in the present case the description does not in my opinion apply indifferently to more than one society, but applies only to the National Association; and, if I were to admit such evidence of intention as is suggested, I should in fact be allowing the testator to make a will by word of mouth. There is in my opinion no doubt about the legal rule which excludes this evidence, and I must hold that the legacy in question is given to the National Association.

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A. C.



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*In re* GREAT COBAR, LIMITED.

BEESON *v.* THE COMPANY.

[1914 G. 85.]

*Company—Practice—Debenture-holders' Action—Appointment of Receiver and Manager—Contract by Company with Agent to sell on Commission—Onerous Contract—Application for Leave for Manager to disregard—No Opposition by Company—Goodwill of no Value.*

On May 23, 1906, the defendant company entered into an agreement with certain agents by which it was agreed that the latter should for a period of fifteen years from January 1, 1907, be the sole agents of the company for the whole world for the sale of copper and silver from the company's mines which the company might desire to sell on certain terms as to commission. On May 24, 1906, a prospectus was issued by the company inviting subscriptions for debentures in which the agreement with the agents was mentioned amongst the scheduled contracts. The debentures which were subsequently issued were in the ordinary form of a charge on the undertaking of the company, but were in no way made subject to the performance of the agreement. In 1914 the plaintiff, who was a debenture-holder, obtained the usual order in a debenture-holders' action, and a receiver and manager of the assets of the company was appointed. The assets of the company were insufficient to satisfy the claims of the debenture-holders, and the goodwill of the company's business was of no value.

On an application by the plaintiff, to which no opposition was offered by the company, for an order that the receiver and manager might be at liberty to disregard the agreement of May 23, 1906:—

*Held*, that the agreement being one which in no way affected the goodwill of the company's business, there was no obligation on the receiver and manager, morally or otherwise, to carry it into effect, and that the order asked for ought to be made.

*In re Newdigate Colliery* [1912] 1 Ch. 468 distinguished.

ADJOURNED SUMMONS.

Great Cobar, Limited, was formed in 1906 for the purpose of acquiring and working certain gold, copper, and coal mines in New South Wales with a capital of 750,000*l.* divided into 150,000 shares of 5*l.* each. The capital was subsequently increased to 1,000,000*l.*

By an agreement dated May 23, 1906, made between the company of the one part and Henry R. Merton & Co., Limited (thereinafter called the agent), of the other part, it was agreed

that the agent should be for the period of fifteen years from January 1, 1907, determinable as thereafter mentioned, the sole agent of the company for the whole world for the sale of all copper and silver from the company's mines for the time being which the company might desire to sell and would at all times use their best endeavours to promote the sale on the best terms obtainable of such products at prices not less than those for the time being fixed by the company. By clause 8 it was provided that the company should pay and the agent might retain out of money payable by the agent to the company a commission of  $1\frac{1}{2}$  per cent. on the net contract price of all silver and copper sold by them after deducting all permitted allowances made to purchasers up to 250,000*l.* (net contract price after deducting allowances) in any one year, and upon any excess in the same year a commission of 1 per cent. on the net contract price, but that no commission should be paid in respect of gold sold. Clause 10 was in the following terms: "The company shall not by sale of its business, by winding up, reconstruction or otherwise terminate or put an end to this agreement, but shall provide that any company or person to whom the company's mines or business shall be transferred shall be bound by the terms of this agreement and shall enter into a supplementary agreement with the agent to give full effect thereto."

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On May 24, 1906, the company issued a prospectus to the public inviting subscriptions for 550,000*l.* of 6 per cent. first mortgage debentures and 130,000 shares of 5*l.* each. Amongst the contracts scheduled to the prospectus was the agreement of May 23, 1906.

Debentures were subsequently issued by the company. These were in the usual form of a floating charge on the assets and undertaking of the company. They contained no reference to the agreement of May 23, 1906.

On January 13, 1914, the plaintiff, who was a debenture-holder, commenced the present action against the company to realize his security, and on April 6, 1914, the usual order in a debenture-holders' action was made, and A. F. Whinney was appointed receiver and manager of the company's property.

On April 9, 1914, the company's mines were closed down, and all copper in hand at that time had now been sold.

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On May 28, 1914, the present summons was taken out by the plaintiff for an order that the receiver and manager might be at liberty to disregard the agreement of May 23, 1906, and for directions to the receiver and manager not to carry out the terms and conditions of the agreement.

In support of the application an affidavit was filed by the receiver and manager in which he deposed that the property and assets of the company would not realize anything like sufficient to satisfy the claims of the debenture-holders, but that on the contrary there would be a very large deficiency, and that in his opinion it was clear that the goodwill of the company would in no way suffer if an order was made giving him leave to disregard the agreement in question. He further alleged that the company had no interest in the present application, which was made solely in the interests of the debenture-holders for relief against an onerous agreement which unless the order asked for was made would operate harshly against them.

The summons came in the first instance before Joyce J. in chambers, who required Henry R. Merton & Co., Limited, to be served with notice of the application in order that they might appear by counsel and argue against the application being granted.

The summons was now heard by Warrington J. for Joyce J.

*Tomlin, K.C.*, and *H. E. Wright*, for the plaintiff. Assuming that the agreement is still subsisting the question is whether its avoidance will affect the goodwill of the company's business. The question is one solely as between the debenture-holders and the company. The agents have no voice in the matter. Until recently no one would have suggested that it was the duty of the manager for the debenture-holders to pay the unsecured creditors of the company. *In re Newdigate Colliery* (1) proceeded on the principle that to permit the receiver and manager in that case to disregard the contracts with the customers of the company would be to destroy the goodwill of the business of the company which it was the duty of the receiver and manager to preserve. There, however, there was a possibility of the goodwill having some value.

(1) [1912] 1 Ch. 468.

That case does not apply to a case where, as here, the evidence shows that there is no value in the goodwill. Cozens-Hardy M.R. in his judgment in that case expressly guarded himself from deciding that there might not be a case in which the Court would allow a particular contract to be disregarded. The only other case having any bearing on the point is *In re Thames Iron-works, Shipbuilding and Engineering Co.* (1), in which Parker J., referring to *In re Newdigate Colliery* (2), said that he did not consider that the Court of Appeal in that case laid down any rule that the Court was bound to sanction any borrowing by a person who had been appointed by the Court a receiver and manager of the undertaking and assets of a company in order to enable him to complete any contract entered into by that company before his appointment. In a contract like that in the present case the money employed to carry it out is in reality the money of the debenture-holders.

It is submitted, however, that the appointment of the receiver and manager put an end to the agreement. The appointment operated to discharge the agents and gave them a right to damages for wrongful dismissal against the company: *Reid v. Explosives Co.* (3) Further, the mines having been closed down and all the copper in hand having been sold the agency came to an end because the subject-matter of it had come to an end.

*P. C. Vaughan*, for the company. The company raises no objection to the present application. The goodwill will not be affected by the avoidance of the contract. There is a strong likelihood that the equity of redemption will prove to be of no value. The agreement is an onerous one and the company would be glad if it were put an end to.

*Hughes, K.C.*, and *W. Gordon Brown*, for Henry R. Merton & Co., Limited. The order asked for ought not to be made. The applicant ought to have regard to the agreement and not to disregard it. The agreement was entered into before the debentures were issued and the debenture-holders took their debentures with knowledge of its existence. It has been acted upon from its date until April 6, 1914, when the receiver and manager was

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(1) (1912) 106 L. T. 674, 676.

(2) [1912] 1 Ch. 468.

(3) (1887) 19 Q. B. D. 264, 269.



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appointed. The appointment of a manager is a very different thing from the appointment of a receiver. A manager is appointed to manage the business of the company. He is a manager only with a view to a sale and to preserve the status quo. The principle laid down in *In re Newdigate Colliery* (1) is very much wider than that suggested by counsel for the plaintiff. Both Fletcher Moulton L.J. and Buckley L.J. emphasize the point that a manager is appointed to preserve the whole undertaking for the benefit of all parties interested, and owes a duty to two classes of persons, namely, the debenture-holders and the unsecured creditors, and that the effect of his breaking the company's contracts is to increase the company's unsecured liabilities and benefit one class at the expense of the other. The question whether a manager is to be at liberty to disregard contracts cannot depend upon the view taken as to whether his doing so will damage the goodwill or whether the equity of redemption is of value or not. And the real principle to be derived from *In re Newdigate Colliery* (1), and which can be overruled, if it is wrong, only by the House of Lords, is that where a mortgagee, whose security includes the goodwill of a business, elects to obtain the appointment of a manager and not a receiver only, the duty of the manager, whilst carrying on the business pending and with a view to realization of the security, is to carry on the business in the state in which he finds it and preserve the status quo, and for this purpose he must perform in due course the current contracts entered into in connection with the business before his appointment so far as the funds at his disposal allow. He is not, however, bound or entitled to raise money by means of a charge having priority to the security of the mortgagee in order to complete onerous contracts, which the funds at his disposal do not enable him to complete, as that is something which the mortgagor, if himself still carrying on the business, could not have done: *In re Thames Ironworks, Shipbuilding and Engineering Co.* (2)

The present case is much stronger than *In re Newdigate Colliery*. (1) Here if the manager does not sell any of the company's produce he is under no obligation under the agreement. For fifteen years all that the company obtained was the

(1) [1912] 1 Ch. 468.

(2) 106 L. T. 674.

proceeds of the sale of the ore less the commission received by the agents, and that was all the debenture-holders obtained their security upon. They took their security subject to that obligation. The agreement is one affecting the whole of the undertaking. It is not right that a manager should do that which is dishonest.

[WARRINGTON J. Neither the manager nor the debenture-holders are bound by this agreement. Suppose a company sold its business without disclosing a certain contract, would you say that it was dishonest of the purchaser to refuse to be bound by it?]

No. We do not suggest here that the manager would be liable for the breach of the contract. He is not bound to sell.

Further, the appointment of the receiver and manager did not put an end to the agreement. The company were and are still, in point of law, in occupation of the property, and the receiver is there as manager of the company's business. A receiver has no right to discharge people contrary to contract: *In re Marriage, Neave & Co.* (1); *Whinney v. Moss Steamship Co.* (2); *Parsons v. Sovereign Bank of Canada.* (3) *Reid v. Explosives Co.* (4) turned on the special circumstances of the case and does not justify the general proposition enunciated in the head-note: per Fletcher Moulton L.J. in *Whinney v. Moss Steamship Co.* (5) The agreement was therefore not put an end to, and consequently if the manager carries on the business of the company he must do so on the terms of the agreement. There is nothing personal about the agreement. It is a purely commercial matter.

In any event the company has no locus standi merely because it is not formally in liquidation to appear at the request of the manager and state that it is insolvent and that the equity of redemption is of no value. If it is insolvent it should be in liquidation, and a liquidator representing the unsecured creditors is the only person who can properly appear and represent the company in such proceedings as these.

*Tomlin, K.C.*, was not called upon to reply.

(1) [1896] 2 Ch. 663, 672.

(2) [1910] 2 K. B. 813.

(3) [1913] A. C. 160, 166.

(4) 19 Q. B. D. 264.

(5) [1910] 2 K. B. 826.

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WARRINGTON J. This is a debenture-holders' action. On April 6, 1914, A. F. Whinney was appointed receiver of the assets of the company and to manage the company's business. [His Lordship read the summons and continued.] The facts are very short. The agreement in question was made on May 23, 1906, prior to the issue of the debentures. It was an agreement made between the company of the one part and Henry R. Merton & Co., Limited (therein called the agent), of the other part, and it provided that the agent should for a period of fifteen years from January 1, 1907, be the sole agent of the company for the whole world for the sale of copper and silver from the company's mines which the company might desire to sell on certain terms as to commission, and it contained this provision in the final clause: [His Lordship read clause 10 and continued:] In the prospectus inviting subscriptions for the debentures the fact of the existence of this agreement was stated, but the debentures were in no way made subject to the performance of this agreement. The debentures are in the ordinary form of a charge on the undertaking of the company. The receiver has been appointed to manage the company's business, and it is clear upon the evidence that the equity of redemption is worthless; in fact the company appears and does not oppose the plaintiff's application. It is opposed by the agents themselves, who had leave from Joyce J. to appear here. Now, is it or is it not right that the receiver should have liberty to disregard this contract? He says it is an onerous contract and that he can do better if he is left at liberty to sell the produce of the mines as he may think fit. The only authority, I think, which is at all in point is *In re Newdigate Colliery*. (1) In that case the business was that of a colliery company; the company before the appointment of the receiver had entered into a number of forward contracts for the supply of coal; the price of coal having risen in the meantime, the plaintiff asked that the receiver and manager might be at liberty to disregard all those contracts so that he might be in a position to sell at the higher price. The Court refused that application in that general form, and did so on this ground, that a part of the security was the goodwill of

(1) [1912] 1 Ch. 468.

the business; that the receiver was appointed to protect and keep up the value of the goodwill as much as any other part of the security, and that if he were to disregard all these contracts he would so damage the reputation of the company that he would practically destroy the goodwill. Having read the judgments in full, I think that was undoubtedly the ground on which the Court refused the order in that case. Cozens-Hardy M.R. in particular, and Fletcher Moulton L.J. not quite so emphatically, both expressed the view that an objection to the application in that case at all events was the generality of the form in which it was put, and the Master of the Rolls expressly guarded himself against deciding that in a particular case it might not be proper to let a receiver disregard a contract entered into with the company. What is the position in the present case? The agreement here was entered into with the company whilst it was carrying on business itself. The debentures were issued and the debenture-holders took their security without being bound by the agreement, neither is the receiver and manager bound by it; he will not be incurring any liability at law or in equity if he disregards it. I express no opinion for the moment on the question whether the agreement has otherwise come to an end by the appointment of a manager either on the theory applicable to contracts of service, or on the theory that the company is no longer selling any goods to which the agreement relates. I think it is much better not to express any opinion on that question, inasmuch as it might possibly prejudice the rights of the parties hereafter. What I do say is that this agreement in no way affects the value of the goodwill of the business. There is no obligation on the receiver that I can see, morally or otherwise, to carry the agreement into effect. He is appointed to manage the business of the company and it is for him to determine through what agents and generally in what way the produce of the company's mines should be sold. I think, therefore, I must make an order in accordance with the application that the receiver be at liberty to disregard the agreement.

Solicitors: *Burn & Berridge; Paines, Blyth & Huxtable; Linklater, Addison & Brown.*

W. I. C.

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Feb. 9, 17.

*In re* BROWNE'S WILL TRUSTS.

LONDON v. BROWN.

[1915 B. 3.]

*Will—Construction—Bequest of Income to “each of such of” several Persons “as shall be living” at the death of a certain person “during their respective lives” and “after their decease” in trust for other Persons—Person entitled to Share of Income of Original Legatees from Time to Time dying.*

A testator gave his trust estate to trustees “upon trust to pay the income thereof to each of such of my said six nieces as shall be living . . . at the time of” the death of “the survivor of my said wife and son, for and during the respective lives of my said nieces, and, from and after the decease of my said six nieces, to stand possessed of my said trust estate and the income thereof,” upon trust for such children of the testator’s son as should be living at the son’s death. Three only of the six nieces survived the testator’s widow and son, and these three were all living. The son left one child him surviving:—

*Held*, that as each niece died, her share of the income did not belong to her legal personal representative until the death of the last surviving niece, and did not go over to the surviving nieces or niece, and that there was not an intestacy as to such share of income until the death of the last surviving niece; but that, as each niece died, her share of income went immediately to the remainderman, the son’s child.

ALFRED HALL BROWNE, by his will dated May 28, 1887, gave the balance of the proceeds of sale and conversion of his real and personal estate, therein called his “trust estate,” upon trust to pay the income thereof to his wife during her life, and, from and after her decease, to pay the income thereof to his son Alfred John Jukes-Browne during his life, and, from and after his decease, as to the testator’s trust estate and the income thereof, in trust for such of his two nieces, being daughters of his late brother John Brown [*sic*], and his four nieces, being daughters of his brother the Rev. Samuel Christmas Brown, as should be living and should not have been married at the time of the decease of the survivor of the testator’s wife and son, in equal shares as tenants in common if more than one. No provision was made by the will for any issue of the testator’s son. By a codicil, dated June 7, 1887, the testator, after reciting the above-mentioned disposition

of his trust estate, and reciting that he was desirous of revoking the trust expressed in favour of his said six nieces and of substituting the trust thereafter declared, did therefore by his said codicil revoke the said trust in favour of his said nieces, and did thereby declare that his trustees should, from and after the decease of the survivor of his said wife and son, stand possessed of his said trust estate (with a quite immaterial exception) upon the trusts following, that is to say: "Upon trust to pay the income thereof to each of such of my said six nieces as shall be living and shall not have been married at the time of the (*sic*) survivor of my said wife and son, for and during the respective lives of my said nieces, and, from and after the decease of my said six nieces, to stand possessed of my said trust estate and the income thereof, upon trust for and to such child or children of my said son as shall be living at his decease, or the issue of any deceased child or children him surviving, share and share alike, as tenants in common if more than one."

The testator died on February 5, 1893, leaving a widow and one child only, namely, the said Alfred John Jukes-Browne. His trust estate, which arose entirely from personalty, amounted to a sum of about 2500*l*. The testator's widow died on January 9, 1900. His son died on August 14, 1914, leaving only one child surviving him, namely, the defendant Amelia Jessie Jukes-Browne. Of the six nieces named or indicated in the testator's will three only survived the testator's son. They were all defendants to the proceedings. One of them, the defendant Emily Gertrude Brown, was also the executrix, and she and the plaintiffs were trustees of the will of the testator's son. One of the testator's nieces, the defendant Ellen Brown, was over eighty years of age. The other two were considerably younger. At the time of the hearing of the case now reported the income of the testator's trust estate was distributable in equal thirds between the three surviving nieces; but doubts having arisen how it would have to be dealt with in the interval between the death of the first of these three nieces to die and of the last of them to die, all the parties desired that this question should be determined between them in anticipation and at the present time.

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SARGANT J. An originating summons was accordingly issued by E. P. Landon and E. J. Browne, two of the trustees of the son's will, against Emily Gertrude Brown (one of the nieces and also the executrix and the other trustee of that will), Ellen Brown and Agnes Mary Brown (the two other surviving nieces), and Amelia Jessie Jukes-Browne (the only surviving child of Alfred John Jukes-Browne) raising the following questions:—

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“(1.) Whether according to the true construction of the said will and codicil . . . and in the events which have happened the income of the trust estate ought, as from the death of A. J. Jukes-Browne, to be paid (a) to such of the defendants Emily Gertrude Brown, Ellen Brown, and Agnes Mary Brown as shall for the time being be living, and if more than one in equal shares, or (b) to the same three defendants and their respective executors, administrators or assigns in equal shares until the death of the last survivor of them, or (c) whether, upon the death of any of the said three defendants in the lifetime of the others or other of them the income of one equal third share in the said trust estate is undisposed of by the said will and codicil until the death of the last survivor of the said three defendants, or (d) whether upon such death an equal third share in the said trust estate will become immediately transferable to the defendant Amelia Jessie Jukes-Browne.”

*H. B. Vaisey*, for the plaintiffs, stated the facts and the questions involved.

*J. K. Young*, for the defendant Emily Gertrude Brown. The testator treats his estate as a mass, and it is to go over as a whole. The executors of a niece who dies do not take her share of the income, for the only gift is during the respective lives of the nieces, and each takes a share for her life only. As against Agnes Mary Brown, it is submitted that the gift of income to the nieces is as tenants in common, and therefore on the death of one niece the others do not take by survivorship, but there is an intestacy as to her share of income until all the nieces are dead. He referred to and distinguished *Jones v. Randall* (1);

(1) (1819) 1 Jac. & W. 100.

*Pearce v. Edmeades* (1); *In re Hobson* (2); *Armstrong v. SARGANT J. Eldridge* (3); *Alt v. Gregory*. (4)

*W. S. Eastwood*, for the defendant Ellen Brown. If a niece dies, her executor takes her share of the income, and each niece or her executor takes until the last surviving niece dies: *Bryan v. Twigg*. (5)

*E. A. Jennings*, for the defendant Agnes Mary Brown. On the death of each niece her share of income goes to the surviving nieces or niece: *In re Firth*. (6)

*Dighton Pollock*, for the defendant Amelia Jessie Jukes-Browne. Each niece is to have her aliquot share of income during her life only. On her death it does not go to her executor or to the surviving nieces or niece, nor is there an intestacy as to the income from her death until the death of the last surviving niece. On and immediately after the death of each niece her share of income goes to my client: *In re Jobson* (7); *In re Hutchinson's Trusts* (8); Theobald on Wills, 7th ed. pp. 515—517.

*Cur. adv. vult.*

Feb. 17. SARGANT J. (after stating the facts). Four possible constructions have been raised by the summons and argued by the different parties before me, namely: (1.) That the income goes equally between the survivors or survivor of the nieces for the time being; (2.) that each of the nieces, either personally or through her legal personal representative, is entitled to a third share of the income till the death of the last survivor; (3.) that on the death of the first niece and the second niece respectively their shares of income are undisposed of and fall to the next of kin of the testator until the death of the last survivor; and (4.) that on the death of each niece the ultimate gift to the remainderman takes effect in respect of her share.

Of these constructions the second may be at once dismissed. The shares of income are expressly given during the respective

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(1) (1838) 3 Y. & C. Ex. 246.

(2) [1912] 1 Ch. 626.

(3) (1791) 3 Bro. C. C. 215.

(4) (1856) 8 D. M. & G. 221.

(5) (1867) L. R. 3 Ch. 183.

(6) [1914] 2 Ch. 386.

(7) (1889) 44 Ch. D. 154.

(8) (1882) 21 Ch. D. 811.



SARGANT J. lives of the surviving nieces only. This is manifestly incompatible with a continuance of a share of income to the first recipient after her death.

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The third contention, namely, that in favour of an intestacy, is equally inadmissible. No intestacy can arise except on the footing that the ultimate gift is a gift of the whole fund together on the death of the survivor of the nieces. But on this footing it is reasonably clear that the codicil must be construed as giving implied life interests in remainder to the nieces respectively in each other's original and accruing shares of income: *Armstrong v. Eldridge* (1); *Pearce v. Edmeades* (2); *Ashley v. Ashley* (3); Hawkins on Wills, p. 202.

The real difficulty lies in choosing between the first construction and the fourth. On the one hand, in all the cases such as those just cited, where life interests in remainder have been implied between the original tenants for life, the gift in remainder has been subsequently expressed as being a gift of the whole fund on the death of the survivor of the tenants for life or of all the tenants for life. On the other hand, the cases such as *Willes v. Douglas* (4), *Turner v. Whittaker* (5), or *In re Hutchinson's Trusts* (6)—where a gift in remainder of the fund on some such semi-equivocal or ambiguous expression as “on the decease of the tenants in common for life” has been construed distributively, so as to carry the share of each tenant for life on his death—have all been, so far as I can find, cases where the donees in remainder have been the children of the respective tenants for life, a circumstance which in most of the cases, though perhaps not all, aided such a contention. On the whole, however, I have come to the conclusion that the fourth or distributive construction is the right one to adopt here. For in a loosely drawn clause of this sort the words “from and after the decease of my said six nieces” may, I think, well have the meaning placed on them of “from and after the decease of my said six nieces respectively,” or “from and after the deceases of my said six nieces,” especially in view of the precise preceding

(1) 3 Bro. C. C. 215.

(2) 3 Y. & C. Ex. 246.

(3) (1833) 6 Sim. 358.

(4) (1847) 10 Beav. 47.

(5) (1856) 23 Beav. 196.

(6) 21 Ch. D. 811.

words "during the respective lives of my said nieces" and of the well-known rule that such words as "from and after the decease" are proper words of remainder and are often merely equivalent to "subject to" or "on the cesser of" the preceding interests. In any case it seems to me easier to modify the somewhat ambiguous terms of the gift in remainder so as to accord with the very precise terms of the prior gift to the respective tenants for life than to change or amplify the terms of that prior gift so as to harmonize with what is merely one construction, though in itself the more probable construction, of the gift in remainder.

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I therefore decide that the proper construction to put on the will is that suggested by question 1 (*d*) of the summons, namely, that upon each death an equal third share in the trust estate will become immediately transferable to the defendant Amelia Jessie Jukes-Browne.

Solicitors for all parties except the defendant Ellen Brown:  
*E. F. & H. Landon.*

Solicitors for the defendant Ellen Brown: *Trinder, Capron  
& Co.*

F. E.

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## PÉLÉGRIN v. COUTTS &amp; CO.

[1914 P. 1226.]

## PÉLÉGRIN v. L. MESSEL &amp; CO.

[1914 P. 1225.]

*Conflict of Laws — Lunacy — Foreign Lunatic not so found — Provisional Administrator — Order of French Court — Securities in Hands of English Bailees — Refusal to deliver without Order of English Court — Costs of Action.*

A domiciled Frenchman resident in Paris deposited securities for safe custody with the defendants in London. He afterwards became a person of unsound mind not so found, and a provisional administrator of his property was appointed by the French Court with express power to receive the securities in question. The defendants, however, when requested to do so refused to act on the order of the French Court and insisted on an action being brought in the English Court, in which they submitted to act as the Court should direct, but claimed to retain their costs of the action. There were no lunacy proceedings in England :—

*Held*, that, having regard to the decision of the Court of Appeal in *Didisheim v. London and Westminster Bank* [1900] 2 Ch. 15, the defendants, in refusing to act on the order of the French Court, had shown an undue and unreasonable excess of caution and ought to bear their own costs of the action.

## NON-WITNESS ACTIONS.

The first of the above-mentioned actions was brought by Jacques Pélégriin and Eugene d'Albert, known as Albert Lake, a person of unsound mind not so found, by Jacques Pélégriin, his next friend, against Coutts & Co. as defendants, claiming that the defendants should deliver and pay to the plaintiff Jacques Pélégriin certain securities of the value of some 30,000*l.* deposited with the defendants for safe custody by Albert Lake before he became of unsound mind and moneys standing to his credit, and that the defendants should pay the costs of the action.

According to the allegations in the statement of claim, by an order dated May 31, 1913, made by the President of the Civil Tribunal of the Seine, the competent and proper tribunal for the purpose, the plaintiff Jacques Pélégriin was appointed provisional administrator (*administrateur provisoire*) of the properties of the

plaintiff Albert Lake for one month from the date of the said SARGANT J. order.

By orders dated July 4, 1913, and July 26, 1913, made by the same tribunal the appointment of the plaintiff Jacques Pélégryn as such provisional administrator as aforesaid was duly confirmed and continued, and by an order dated May 23, 1914, and made by the same tribunal (after reciting the three orders aforesaid and that by reason of the difficulties which the plaintiff Jacques Pélégryn had encountered in the fulfilment of his mission, particularly with, amongst other persons, the defendants, Jean d'Albert Lake, the son of the plaintiff Albert Lake, applied that the said mission of the plaintiff Jacques Pélégryn should be more fully specified and completed as far as needful), power was given in interpretation and completion as far as needful of the said order of July 26, 1913, to the plaintiff Jacques Pélégryn as such provisional administrator as aforesaid to receive from the defendants all sums, securities, and title deeds whatsoever deposited with them by the plaintiff Albert Lake, and all interest accrued or to accrue due received or to be received on the said sums and securities, and to give good and valid discharge therefor, and also in his capacity of provisional administrator in the name of the plaintiff Albert Lake and as being responsible for his interests, or in any other capacity that he may be advised, to commence and prosecute proceedings before the English Courts against the defendants in order to receive and obtain payment of the said sums, securities, title deeds, revenues or interest, to follow up and terminate the said actions, and generally to do all things and all acts which he should consider necessary or useful in order to receive the said sums, securities, and title deeds, revenues and interest, or part of each of them respectively.

The defendants had been commercial agents for and had commercial relations with Albert Lake before he became of unsound mind.

There were no lunacy proceedings in England.

Notwithstanding the orders of the French Court, which the plaintiff Jacques Pélégryn offered to prove in any way satisfactory to the defendants, the defendants required him to bring an action in the Courts of this country in order that they might

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SARGANT J. have the protection of an order of the English Court in making the delivery and payment. The plaintiffs then brought this action.

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The defendants by their defence stated that they had always been ready and willing to deliver up the securities and to pay the moneys to the plaintiff Jacques Pélégriin subject to their getting a valid discharge for the same, but craved the protection of an order of the Court decreeing such delivery and payment. They further stated that they were ignorant of and therefore did not admit the allegations in the statement of claim relating to the orders of the French Court and required production of the orders, and submitted to act in the premises as the Court should direct, but claimed to retain costs as between solicitor and client of the action and all other (if any) their costs properly incurred.

The second of the above-named actions was a similar action under similar circumstances brought against London stock-brokers in respect of certain other securities of the value of some 4000*l.* and moneys.

The defendants in this action took up the same attitude, submitting by their defence to act as the Court should direct and asking that their costs might be provided for.

The two actions were called and heard together.

An affidavit was made by Jean d'Albert Lake and the plaintiff Jacques Pélégriin exhibiting duly authenticated copies of the orders together with the translations thereof in the English language.

Evidence of the foreign law was given by Henri Mesnil, a French advocate, who stated in his affidavit (*inter alia*) as follows :

" 1. . . . I am acquainted with the French law and procedure relating to persons of unsound mind. I am also acquainted with the English law and procedure relating to the same subject, and also with the Belgian law relating thereto, which is the same in all substantial particulars as the French law.

" 2. I have read the affidavit of Jean d'Albert Lake and the plaintiff Jacques Pélégriin . . . and the copy orders exhibited thereto. The said copies are duly authenticated copies of such orders and are duly sealed with the seal of the Courts to which

the original orders belong, and the said copies are official documents received as conclusive evidence in all French Courts of the orders therein respectively set out. SARGANT J. 1915

"3. . . . The order of May 23, 1914, referred to in the said affidavit does not make any special provision as to the duration of the powers of the provisional administrator therein referred to, which would therefore remain in force until May 22, 1917."

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"5. According to French law the powers of a provisional administrator include the power on behalf of the person for whom he has been appointed administrator to receive and give a good discharge for all personal property (including scrip and stock and share certificates relating to securities of any kind) and moneys whether capital or income due at the commencement or to become due during the period of such administration, to demand and settle accounts, and to represent the person of unsound mind in legal proceedings. The said order of May 23, 1914, is according to French law a sufficient authority to the plaintiff Jacques Pélégriin to give a good and valid discharge to any person holding moneys or securities of the said Albert Lake (as are also the previous orders taken collectively), and it is also a sufficient authority to commence proceedings in England on behalf of the said Albert Lake without any further sanction or direction on the part of any French Court."

*J. F. W. Galbraith*, for the plaintiffs. The order of May 23, 1914, is substantially the same as the order made by the Belgian Court in *Didisheim v. London and Westminster Bank* (1), and since the decision of the Court of Appeal in that case the defendants had no grounds for insisting on the protection of an order of the English Court. I ask that no costs should be given against the plaintiffs. [He referred to the Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 7.]

*F. E. Farrer*, for the defendants in the first action. A gratuitous bailee is entitled to the same protection as a trustee: *South Australian Insurance Co. v. Randell* (2); *In re Tidd* (3); and to a complete indemnity against costs: *New York Security*

(1) [1900] 2 Ch. 15.

(2) (1869) L. R. 3 P. C. 101, 108, 110.

(3) [1893] 3 Ch. 154.

SARGANT J. *and Trust Co. v. Keyser* (1); Story on Bailments, 9th ed.,  
 1915 p. 126, s. 121. The defendants were entitled to the protection  
 PÉLÉGRIN of an order of the English Court and to insist on an action in  
 v. of which the questions of the competency of the foreign Court and  
 COUTTS & CO. the validity of the orders could be determined. The fact stated  
 PÉLÉGRIN in the evidence that the orders were only in force for three  
 v. years—which does not appear on the face of them—in itself  
 L. MESSEL & Co. illustrates the necessity for caution.

*Austen-Cartmell*, for the defendants in the second action. The defendants could not have safely delivered these securities to the administrator without further proof of his title than is afforded by the orders. The decision in *Didisheim v. London and Westminster Bank* (2) was on an order made by a Belgian, not by a French, Court, and it has required a somewhat elaborate affidavit in the present case to explain the French law on the subject. Foreign law is a question of fact, and the defendants had to be satisfied that the orders were made by a competent tribunal. The judgment of Lindley M.R. in *Didisheim v. London and Westminster Bank* (3) shows that the defendants are entitled to evidence that the person demanding delivery was “duly appointed by a competent authority.” The title of the plaintiff Jacques Pélégriin was not so undeniably clear that the defendants could have delivered the securities or paid the moneys to him without risk to themselves.

SARGANT J. These are two actions in which the provisional administrator appointed by the French Courts of the property of a domiciled Frenchman is coming to ask this Court for a transfer of securities deposited with the defendants, who in the case of one of the actions are bankers—Messrs. Coutts & Co.—who have had commercial relations with the Frenchman who is now of unsound mind, and in the case of the other action are stockbrokers who have also had commercial relations with him. He was himself a French stockbroker, and Messrs. Coutts & Co. held for safe custody on his behalf securities to the value of about 30,000*l.* and the other defendants securities to the value

(1) [1901] 1 Ch. 666, 670.

(2) [1900] 2 Ch. 15.

(3) [1900] 2 Ch. 50, 51.

of about 4000*l*. [His Lordship stated the facts relating to the making of the various orders by the French Courts and the effect of those orders and continued:] Seeing that there was no difficulty in proving these orders to the defendants and that an offer was made to prove them in any manner satisfactory to them, the defendants in my opinion showed an undue and unreasonable excess of caution in requiring an action to be brought against them in an English Court and in refusing to transfer the securities without an order of the English Court. The law on the subject has been fully recognized ever since the well-known case of *Didisheim v. London and Westminster Bank*. (1) In that case an administrator had been appointed by the Belgian, not the French, Court, but the principle on which the case was decided is entirely independent of that fact. North J. had declined to make an order, and in the interval an order had been obtained which was similar to the order of May 23, 1914, of the French Court in the present case; indeed it was probably taken as the model for that order.

Lindley M.R., in delivering the judgment of the Court of Appeal, says (2): "On general principles of private international law, the Courts of this country are bound to recognise the authority conferred on him by the Belgian Courts, unless lunacy proceedings in this country prevent them from doing so." There were no such lunacy proceedings in this case, nor were there in *Didisheim v. London and Westminster Bank*. (1) Then his Lordship continues: "What ought to be done in lunacy has not to be considered, and we say nothing on that subject." The position is not quite the same as if the present defendants were trustees. Though no doubt gratuitous bailees as regards the property in question, they are in fact commercial agents in this country for and having commercial relations with the French lunatic; and though Mr. Farrer has argued that because this is a question of facts which have occurred abroad the defendants are justified in having the facts established in this country, in my opinion to accede to this argument would be to paralyze to a great extent commercial transactions with foreign countries. If the Frenchman, instead of being a lunatic, had been adjudicated

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SARGANT J. a bankrupt abroad, it would be absurd to suggest that it would be necessary or proper for bailees of his property in this country to insist on an action being brought before they transferred the property to the person appointed by the foreign Court to deal with and administer the property of the bankrupt. While nothing can be said against the good faith of the defendants in the present cases, they have in my opinion displayed an unreasonable excess of caution in the attitude which they have adopted. Mr. Galbraith does not ask for costs against the defendants, but only that they may not be allowed costs against the plaintiffs. Accordingly I decline to make any order in regard to costs except to give the defendants Messrs. Coutts & Co. their costs of an affidavit setting forth the precise amount of the securities in their hands, and to give the other defendants the costs of a similar affidavit which they are ready to file. The substantive part of the order will be that the defendants are to deliver the securities to the plaintiff Jacques Pélégri<sup>n</sup> and account to him for the balances in their hands.

[It being stated that the plaintiff Jacques Pélégri<sup>n</sup> would be unable to attend personally in London to receive the securities, the terms of the respective orders were that the respective defendants deliver the securities at their respective offices in London to the agent appointed by the plaintiff Jacques Pélégri<sup>n</sup> under power of attorney to receive the same, duly verified. The orders to be post-dated so as to direct such delivery to such agent by name. The respective defendants to account for the cash balances to the plaintiff Jacques Pélégri<sup>n</sup> and to pay the same to him less the costs of an affidavit verifying the same. Subject as above, no order as to costs. Liberty to apply on any question arising in relation to the authority of the agent to receive the delivery aforesaid, the costs of any such application to be reserved.]

Solicitors: *W. F. Greig; Farrer & Co.; Bircham & Co.*

A. C.

## FORAN v. ATTORNEY-GENERAL.

[1913 F. 788.]

*Revenue—Duties on Land Values—Valuation—Increment Value Duty—Unworked Minerals—Land in Occupation of Tenant—Minerals reserved to Owners of Land—Form 4—Notice irregular—Waiver—Return made by Owners as to Land—Omission in Return to specify Nature of Minerals and Estimate of their Capital Value—Right of Owners to make Separate Return as to Minerals—Substituted Capital Value—Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 23, sub-ss. 1, 2, 4; s. 26, sub-ss. 1, 2—Revenue Act, 1911 (1 Geo. 5, c. 2), s. 2.*

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By s. 23, sub-s. 2, of the Finance (1909-10) Act, 1910, "For the purposes of valuation under this Part of this Act, all minerals shall be treated as a separate parcel of land; but, where the minerals are not comprised in a mining lease or being worked, they shall be treated as having no value as minerals, unless the proprietor of the minerals, in his return furnished to the Commissioners, specifies the nature of the minerals and his estimate of their capital value . . ." By s. 26, sub-s. 1, a valuation is to be made of all land in the United Kingdom, and each piece of land which is under separate occupation is to be separately valued and the value is to be estimated as on April 30, 1909. By sub-s. 2 the owner of land, on being required by notice from the Commissioners, is to furnish to the Commissioners within thirty days a return containing such particulars as the Commissioners may require for the purpose of the valuation of the land.

The owners of a certain farm which was let to a tenant, the minerals being reserved to the owners, and not comprised in any lease nor being worked, received a notice to make a return accompanied by Form 4, on which the return was to be made. The copy of Form 4 supplied to the owners required them to furnish particulars of the house and land in the occupation of the tenant, and in the opinion of the Court of Appeal did not relate to the unworked minerals although it incidentally referred to them. The notice was invalid inasmuch as it did not give the owners the thirty days allowed by the Act within which to make the return. The owners, however, filled up the form, but in ~~so~~ doing left blank a space provided for the insertion therein of the nature of the minerals and the estimate of their capital value.

In an action by the owners against the Attorney-General for a declaration (1.) that they were not bound by the return so far as it related to the minerals, and (2.) that they were entitled to make a separate return as to the minerals:—

*Held* by the Court of Appeal, reversing the decision of Warrington J., that the copy of Form 4 served upon the owners was not a proper notice requiring a return of particulars respecting the minerals, and did not treat them as a separate parcel of land; that there had been no return

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—

with respect to the minerals within s. 23, sub-s. 2; and that the owners were entitled to make a return upon a proper form in pursuance of a proper notice, and to have a separate provisional valuation of the minerals treated as a separate parcel of land. When that had been done there was nothing to preclude them from having a substituted capital value of the minerals pursuant to s. 23, sub-ss. 1 and 4, and s. 2, sub-s. 3, as amended by s. 2 of the Revenue Act, 1911.

#### ACTION.

This was an action brought by Canon William Francis Foran and Hubert Scott Cartwright, the present trustees of the settlement executed on the marriage of Wilfrid Brougham and Francis Isabella, his wife, and dated June 3, 1863, claiming as trustees (1.) a declaration that Form 1 and Form 4—Land, served in respect of certain property known as Appleton Farm in the parish of Waldershare, Kent, were respectively unauthorized and void; (2.) a declaration that they were not bound by the return made on Form 4—Land, or (in the alternative) that they were not bound by the return so far as it related to minerals under the land; (3.) a declaration that they were at liberty to make a return in respect of the property, both surface and minerals, or (in the alternative) in respect of the minerals; (4.) a declaration that they were not bound by a certain provisional valuation; and (5.) a declaration that they were entitled to make an application for a substituted capital value in respect of the minerals.

The following statement of facts is taken from the judgment of Warrington J. :—

“In the year 1910 Charles Archer Cook and the plaintiff, Canon Foran, were, as trustees, the owners of a farm called Appleton Farm, in the county of Kent. The two plaintiffs are the present trustees. The farm was let on lease to one Prebble, the minerals being reserved to the lessors. The minerals were not comprised in any mining lease, nor were they being worked.

“On September 12, 1910, the trustees’ solicitors, Messrs. Roy & Cartwright, received a notice, dated September 10, to make returns, requiring the returns to be made within thirty days from that date, accompanied by certain instructions as to the mode of making the return, and by the famous Form 4, on

which the return was to be made. There is no question now that, owing, at any rate, to the fact that the notice did not give the owners the full thirty days mentioned in the Finance (1909-10) Act, 1910, they were under no obligation to make the return, and would not have incurred any penalty for refusing to do so. They did, however, make the return on October 14, 1910, and this is the return the effect of which is in question.

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“The notice is addressed to the owners of Appleton Farm, Waldershare, per Messrs. Roy & Cartwright, Coleman Street, E.C., and contains the following relevant passages: ‘I am to point out that the expression “land” includes all buildings and other structures thereon, and all minerals on, in, or under the surface of the land. The necessary particulars are to be furnished separately as respects each piece of the land which is under separate occupation, and, for the purposes of valuation, minerals are to be treated as a separate parcel of land. You may, if you think fit, furnish your estimate of the total value and the site value of the land. If you desire to do so, the values declared are to be estimated as on April 30, 1909, they are to be declared separately as respects each piece of land which is under separate occupation, and may be declared separately, if you think fit, as respects any part of any land which is under separate occupation. If you require a further supply of forms for the purpose of making returns, please inform the officer at once of the number required.’

“The instructions also contain the following passages which are material. Paragraph 2: ‘The expression “land” includes all buildings and other structures thereon, and all minerals on, in, or under the surface of the land.’ Paragraph 6: ‘For the purposes of valuation, minerals are to be treated as a separate parcel of land; but where the minerals are not comprised in a mining lease, or being worked, they are to be treated as having no value as minerals unless the proprietor of the minerals, in his return, specifies the nature of the minerals and his estimate of their capital value.’ Then the tenth and last paragraph is: ‘The total value of minerals means the amount which the fee simple of the minerals, if sold in the open market by a willing seller in their then condition, might be expected to realise, and the capital



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value of minerals means the total value, after allowing deductions for any works executed or expenditure of a capital nature incurred bona fide by or on behalf of any person interested in the minerals for the purpose of bringing the minerals into working, or where the minerals have been partly worked, such deduction as is proportionate to the amount of minerals which have not been worked.'

"The form, which was headed 'Return to be made by an owner of land or by any person receiving rent in respect of land,' was filled up before being sent to the owners as follows: 'Particulars extracted from the rate-books. Parish: Waldershare. Number of Poor Rate: 1 and 2. Name of Occupier: William Prebble. Description of Property: House premises and land. Situation of Property; Appleton Farm. Estimated extent: 215 acres 3 roods. Gross Estimated Rental (or Gross Value in Valuation List): 140*l.* Rateable Value: 130*l.*' The material point of this is that the land was stated to be in the occupation of Prebble, who had no interest in the minerals. Under clause (*t*) the form contained the following questions and footnote relating thereto: '(i.) Does the person making the return own the minerals comprised in the land? (ii.) If so, state: (*a*) Whether the minerals were, on April 30, 1909, comprised in a mining lease or being worked by the proprietor. (*b*) Whether the minerals are now comprised in a mining lease or being worked by the proprietor. (iii.) If not, state the name and address of the proprietor of the minerals.' Then the footnote is: 'Minerals not comprised in a mining lease, or being worked, are to be treated as having no value as minerals unless the proprietor of the minerals fills up space (*w*) below.' The owners, in making their return, answered the questions in clause (*t*) as follows: In answer to (i.)—namely, Does the person making the return own the minerals?—they say 'It is believed so.' In answer to (ii.), that is to say as to the working of the minerals, the answer is in the negative; as to the name and address of the proprietor the answer is: 'The persons making the return.'

"Under the head of 'Additional particulars which may be given, if desired' is clause (*w*), being that which is referred to

in the footnote. Clause (iv) is: 'Nature, and estimate of the capital value of any minerals not comprised in a mining lease and not being worked, which have a value as minerals.' The owners, in making the return, left this space blank."

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On December 30, 1910, the trustees entered into an agreement with the Deal and Walmer Coalfield, Limited, for the sale to the company of the farm and all mines and minerals thereunder for 5500*l.*, and the agreement was duly carried out by a conveyance dated March 29, 1911.

The provisional valuation, which was dated August 22, 1911, fixed the original gross value at 3400*l.* and the original assessable site value at 2610*l.* From this valuation the trustees appealed, and as a result these values were on August 8, 1913, raised to 3705*l.* and 2650*l.* respectively.

The material provisions of the Finance (1909-10) Act, 1910, were the following:—

Sect. 2, sub-s. 3. "Where it is proved to the Commissioners on an application made for the purpose within the time fixed by this section that the site value of any land at the time of any transfer on sale of the fee simple of the land or of any interest in the land, which took place at any time within twenty years before the thirtieth day of April, nineteen hundred and nine, exceeded the original site value of the land as ascertained under this Act, the site value at that time shall be substituted, for the purposes of increment value duty, for the original site value as so ascertained, and the provisions of this Part of this Act shall apply accordingly.

"Site value shall be estimated for the purposes of this provision by reference to the consideration given on the transfer in the same manner as it is estimated by reference to the consideration given on a transfer where increment value duty is to be collected on the occasion of such a transfer after the passing of this Act.

"This provision shall apply to a mortgage of the fee simple of the land or any interest in land in the same manner as it applies to a transfer, with the substitution of the amount secured by the mortgage for the consideration.

"An application for the purpose of this section must be made

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within three months after the original site value of the land has been finally settled under this Part of this Act."

Sect. 23. "(1.) For the purposes of this Part of this Act, the total value of minerals means the amount which the fee simple of the minerals, if sold in the open market by a willing seller in their then condition, might be expected to realise, and the capital value of minerals means the total value, after allowing such deductions (if any) as the Commissioners may allow for any works executed or expenditure of a capital nature incurred bona fide by or on behalf of any person interested in the minerals for the purpose of bringing the minerals into working, or where the minerals have been partly worked, such deduction as is, in the opinion of the Commissioners, proportionate to the amount of minerals which have not been worked.

"(2.) For the purposes of valuation under this Part of this Act, all minerals shall be treated as a separate parcel of land; but, where the minerals are not comprised in a mining lease or being worked, they shall be treated as having no value as minerals, unless the proprietor of the minerals, in his return furnished to the Commissioners, specifies the nature of the minerals and his estimate of their capital value . . . .

"(4.) Except where the context otherwise requires, any references in this Part of this Act to the site value of land shall, in cases where the land consists solely of minerals, or comprises minerals, be construed, so far as respects the minerals, as a reference to the capital value of the minerals."

Sect. 26. "(1.) The Commissioners shall, as soon as may be after the passing of this Act, cause a valuation to be made of all land in the United Kingdom, showing separately the total value and the site value respectively of the land, and in the case of agricultural land the value of the land for agricultural purposes where that value is different from the site value. Each piece of land which is under separate occupation, and, if the owner so requires, any part of any land which is under separate occupation, shall be separately valued, and the value shall be estimated as on the thirtieth day of April nineteen hundred and nine.

"(2.) Any owner of land and any person receiving rent in

respect of any land shall, on being required by notice from the Commissioners, furnish to the Commissioners a return containing such particulars as the Commissioners may require as to the rent received by him, and as to the ownership, tenure, area, character, and use of the land, and the consideration given on any previous sale or lease of the land, and any other matters which may properly be required for the purpose of the valuation of the land, and which it is in his power to give, and, if any owner of land or person receiving any rent in respect of the land is required by the Commissioners to make a return under this section, and fails to make such a return within the time, not being less than thirty days, specified in the notice requiring a return, he shall be liable to a penalty not exceeding fifty pounds to be recoverable in the High Court.

“(3.) Any owner of land may, if he thinks fit, furnish to the Commissioners his estimate of the total value or site value or both of the land, and the Commissioners, in making their valuation, shall consider any estimate so furnished.”

By the Revenue Act, 1911, s. 2, it is provided that sub-s. 3 of s. 2 of the Act of 1910 “shall apply to the case of any transfer on sale of the fee simple of the land or of any interest in the land which took place twenty years or more before the thirtieth day of April nineteen hundred and nine, and which was a transfer to the person who is the owner of the land or any interest in the land at the time when an application is made under that provision, as it applies to the case of a transfer on sale which took place within twenty years before the thirtieth day of April, nineteen hundred and nine . . . .”

The action was heard before Warrington J. on July 23, 1914.

*Cave, K.C., W. Allen, and A. H. F. Pretty*, for the plaintiffs. The Commissioners claim that by virtue of the return made by the trustees the minerals under the land are to be taken as having no value at all on April 30, 1909, and, accordingly, that the whole of the consideration received for the minerals on their sale in December, 1910, must be treated as increment and must bear increment value duty. There is no suggestion of an actual

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increase in value between April 30, 1909, and the date of the sale. It is submitted that the plaintiffs are not bound by the return as regards the minerals, and they claim to make a return now—to have the minerals valued and to pay duty accordingly. Minerals are by s. 23, sub-s. 2, to be treated as a separate parcel of land; the return, therefore, must be a return relating to the minerals as a parcel of land. By s. 26, sub-s. 1, any piece of land in separate occupations is to be separately valued. Here the surface of the land was in the occupation of Prebble and the minerals in that of the trustees. The form in the present case treated the surface and the minerals as one parcel and not as separate parcels of land and was therefore invalid. The trustees were entitled to have the minerals separately valued. The trustees were never asked to furnish and never in fact furnished any return as to the minerals. They were only asked to make and did make a return as to the land in Prebble's occupation. The inquiry must be made in respect of a specified parcel of land, in this case the minerals: *Burghes v. Attorney-General*. (1)

Further, the notice and form were invalid because the trustees were thereby required to comply with the requisitions contained in the form within less than thirty days from the receipt thereof: *Dyson v. Attorney-General* (2); *Burghes v. Attorney-General* (1); and consequently the return made by the trustees is not binding on them.

The plaintiffs also submit that the power conferred by s. 2, sub-s. 3, of the Act of 1910 and s. 2 of the Revenue Act, 1911, to claim substituted capital value applies to the minerals under the land in question.

The objection to the jurisdiction of the Court to make the declarations asked is covered by *Dyson v. Attorney-General*. (3)

[They also referred to s. 1; s. 2, sub-s. 2 (a), sub-s. 3; s. 4; s. 16, sub-s. 4; s. 20; s. 22, sub-ss. 1, 2, 7; s. 23, sub-ss. 1, 2; s. 24; s. 25; s. 26, sub-ss. 1, 2, 3; s. 27, sub-s. 1; s. 33; s. 41 of the Act of 1910.]

*Sir S. O. Buckmaster, S.-G., and W. R. Sheldon*, for the Attorney-General. There are before the Court for determination

(1) [1912] 1 Ch. 173.

(2) [1912] 1 Ch. 158, 164.

(3) [1911] 1 K. B. 410.

two matters only—the statute which has to be construed, and the forms which have been served in pursuance of its provisions.

For the purpose of obtaining the information on which a valuation is to be made there is nothing in the Act which says that the information can be collected in respect of land only in separate occupation. The language of sub-s. 2 of s. 26 is quite different from that of sub-s. 1 of the same section. There is no warrant for the contention that the return must be made by the person who is in occupation of the particular piece of land. The capital valuation of minerals at nil under s. 23, sub-s. 2, is a statutory valuation and not a valuation by the Commissioners. The Commissioners have no discretion in the matter. There can therefore be no substituted capital value.

Further, as to Form 4, it is not suggested that the trustees believed that another form would be served upon them as regards the minerals. They might in the circumstances have treated the notice and form as waste paper as suggested by Cozens-Hardy M.R. in *Dyson v. Attorney-General* (1), but they did not do so. They made a return on the form, clause (t) of which contained a footnote stating that “Minerals not comprised in a mining lease or being worked are to be treated as having no value as minerals unless the proprietor of the minerals fills up space (w) below.” At the time the trustees made the return they attached no importance to the minerals and deliberately left space (w) blank. They therefore waived the irregularity in the notice and form and are bound by the return made by them.

*Cave, K.C., in reply.*

*Cur. adv. vult.*

1914. July 30. WARRINGTON J. read the following judgment:—  
The real question in this case is whether a return made by the predecessors in title of the plaintiffs in reference to certain land is “their return” for the purposes of s. 23, sub-s. 2, of the Finance (1909-10) Act, 1910. In that return the persons making it, who were the proprietors of the land and of the minerals, did not specify the nature of the minerals or their

(1) [1912] 1 Ch. 158, 164.

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estimate of their capital value. If the return is the return referred to in the sub-section, then the minerals are to be treated as having no value as minerals on April 30, 1909, with the result that, the minerals having recently been sold, there is a considerable increment value on which increment value duty is payable. The Crown contends that the return in question was the return contemplated by the section, and accordingly the capital value of the minerals was finally settled as nil by the operation of the section. The plaintiffs say that no return such as is contemplated by the section has been made, and that they are entitled to have the real value of the minerals as on April 30, 1909, properly ascertained; and they assert that if this is done there will be little or no increment value liable to duty. The plaintiffs ask for a declaratory judgment only. No facts are in dispute. The only questions are the construction of the statute and the effect of what has been done on either side in compliance or affected compliance with it. The actual figures and the hardship or otherwise of the consequences to the plaintiffs are irrelevant, and I propose to exclude them from consideration.

The Act in question imposes on what is called the increment value of land a duty called increment value duty to be collected on certain occasions, including a sale of the land. In the ordinary case of land, the increment value is the difference between the site value on the occasion when the duty is collected and the original site value, and the Act provides rules for ascertaining these site values respectively. Sect. 2, sub-s. 3, provides for what is generally known as substituted site value in the following terms: [His Lordship read the sub-section and continued:] By s. 2 of the Revenue Act of 1911 the limit of twenty years is in certain cases removed.

With regard to minerals, special provisions are contained in s. 23. These provisions, so far as material, are as follows: [His Lordship read sub-ss. 1, 2, and 4 of the section and continued:] In the case of minerals, therefore, increment value is the difference between the capital value on the occasion on which the duty is collected and the capital value on April 30, 1909, and if the latter part of s. 2 applies, the increment value will be the entire capital value on the occasion in question. I pass over s. 25,

which contains definitions of the several values which have to be ascertained in the case of land in the ordinary sense, inasmuch as the provisions of this section are not applicable to minerals. Sect. 26 is in the following terms: [His Lordship read the section and continued:] Sect. 27 provides for service of a copy of the provisional valuation of any land on the owner, and for the means whereby it may be questioned and in proper cases altered. There is nothing else which is, I think, material. [His Lordship then stated the facts as above set out and continued:] Therefore, if this is their return referred to in s. 23, sub-s. 2, they did not in it specify the nature of the minerals or their estimate of their capital value; and under the statute the minerals are to be treated as having no value as minerals.

The plaintiffs contend that they are not bound by the return, owing to legal defects in the notice and form. They say that as it was made in compliance with a demand which had no legal force, the return itself may be treated as of no effect. In my opinion this contention is not well founded. The owners have given the information required by the statute, and I cannot see how the binding effect of their statement can be affected by their being under the impression—a false one as it turns out—that they were legally bound to make it. In my opinion, therefore, the validity or otherwise of the notice and of Form 4 is immaterial to the question to be determined. Is this return, then, the return referred to in s. 23, sub-s. 2? The plaintiffs say that it is not. They contend that for the purposes of valuation the minerals are a separate parcel of land, and have therefore to be separately valued, that a separate return for the purpose of such valuation should have been asked for, and that such separate return, if any, and that only, is the return mentioned in the section. In my opinion this is not the correct view. I agree so far that the return referred to is the return contemplated by s. 26, namely, a formal document furnished to the Commissioners in compliance with a demand for information; but I fail to see why it should follow, from the fact that minerals are to be treated as a separate parcel of land for the purposes of valuation, that there must of necessity be a separate return in order to bring s. 23, sub-s. 2, into operation. It is true that the

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1915 of William Prebble; but the return at the same time states that  
FORAN the land comprises minerals of which the persons furnishing it  
v. are the proprietors. The separate occupation of the minerals—  
ATTORNEY- if, in fact, there can be said to be any occupation of unworked  
GENERAL. minerals, apart from that which is incident to ownership—seems  
Warrington J. to me to be immaterial, seeing that, whether separately occupied  
or not, the minerals are to be treated as a separate parcel of land  
for the purposes of valuation. The answer to the plaintiffs' case  
seems to me to be that they have been invited to make their  
return in reference to the land, including the minerals comprised  
in it, and have made their return, and that there is nothing in  
the Act to require a separate return as to minerals where, as  
here, the owners of the land are the proprietors of the minerals.

It is said that the proprietors cannot make an estimate of the  
capital value, inasmuch as this depends on what deductions  
the Commissioners may allow. But I see no difficulty in the  
proprietors arriving at the sum which they think should be  
allowed as deductions, and thus arriving at an estimate of capital  
value. Moreover, if any difficulty is caused, it is caused by the  
Act itself, and not by the notice or the form.

As to the suggested right to have a substituted capital value  
fixed, analogous to the substituted site value, I fail to see how  
there can be any substituted value affixed to that which is  
declared by the Act to be of no value. There is no original  
capital value for which the value or price referred to in s. 2,  
sub-s. 3, can be substituted.

On the whole, I ought not, I think, to make any of the  
declarations asked for, and the plaintiffs' action must be  
dismissed.

W. I. C.

C. A. The plaintiffs appealed. The appeal came on for hearing on  
Feb. 17, 1915.

*Cave, K.C.*, and *W. Allen*, for the appellants. The appellants  
are entitled to maintain this action: *Dyson v. Attorney-  
General*. (1)

(1) [1911] 1 K. B. 410.

[*Sir S. O. Buckmaster, S.-G.* I must not be taken as assenting to the proposition that this form of action is either right or admissible, but as the point raised is important I waive objection to it in this Court and in the House of Lords.]

It has been decided that Form 4 is an invalid form and that the statutory period of thirty days must be allowed: *Dyson v. Attorney-General*. (1) The appellants did not have the full statutory period and the return is not binding on them. It is not disputed that the form is bad, but it is said that the appellants have accepted and answered it and so waived any objection to it. But you cannot waive a right until you know you have a right, and if you comply under pressure there can be no waiver: *Davies v. Price*. (2) In this case the appellants did not know the facts; and they complied and filled up the form under an illegal threat of a fine. To say that the form is binding, not only as to what they say but also as to what they admit, is pressing waiver beyond its usual meaning.

Further, it is submitted that this is not the return contemplated in s. 23, sub-s. 2, of the Finance (1909-10) Act, 1910. That section contemplates a separate return where the surface and the minerals are under separate occupations (s. 26, sub-s. 1). Occupation is the unit of valuation. The return in this case clearly applies to the surface only.

Again, under s. 23, sub-s. 2, there ought to have been a separate valuation of the minerals. Sect. 27 applies to all land, and there is nothing which dispenses with the necessity for the Commissioners to serve a separate provisional valuation of the minerals. By s. 23, sub-s. 1, in order to arrive at the capital value certain deductions have to be made. That means that in making a provisional valuation the Commissioners must allow a deduction for expenditure of a capital nature. The scheme of the Act shows that there must be a provisional valuation in which the Commissioners should state their view on these points. In Form 4, clause (w), there is an invitation to estimate the capital value of the minerals, but that capital value is subject to such deductions as the Commissioners may allow. The proprietor is not in a position to know what those deductions

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(2) (1864) 34 L. J. (Q.B.) 8.

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will be. That strengthens the view that there ought to be a separate return in respect of the minerals.

[PHILLIMORE L.J. Could not the proprietor make the return "less so much as the Commissioners may allow" ?]

That would not be "his return" within s. 23, sub-s. 2. In this case no return in respect of the minerals was required by the notice. The appellants further submit that they are entitled, under s. 2, sub-s. 3, and s. 23, sub-ss. 1 and 4, of the Act of 1910, as amended by the Revenue Act, 1911, s. 2, to claim substituted capital value in respect of the minerals. The appellants are entitled to the alternative declaration under head (2.) of the prayer in the statement of claim, and declarations under heads (3.) and (5.).

*Sir S. O. Buckmaster, S.-G., and W. R. Sheldon*, for the Attorney-General. This case depends upon the way in which valuations are to be made of minerals for the purposes of increment value duty. That duty is levied upon the difference between two values. It attaches on two occasions, the first of which is a transfer on sale. The position with regard to minerals is different from that with regard to the surface, although minerals, for the purposes of valuation, are to be regarded as land. But the tax is not levied in the same way.

By s. 23, which applies to the valuation of minerals, they are to be treated as having no value unless the proprietor in his return furnished to the Commissioners specifies the nature of the minerals and his estimate of their capital value. If he makes a return and omits to state the nature and value of the minerals they are to be treated as of no value. Sect. 26 renders it compulsory upon the Commissioners to make the valuation, but there is no obligation upon them to serve any notices or forms upon the proprietors of land except the provisional valuation (s. 27). They can obtain their information in any way they think fit, but if they require the owner of land to furnish a return he is bound under a penalty to do so. The Commissioners have served no provisional valuation with respect to these minerals because in their view, by the failure of the proprietors in their return to specify the nature of the minerals and estimate their capital value, they are by the terms of the statute to be treated as having no value as minerals. Under s. 26, sub-s. 2, the Com-

missioners need not require the owner to furnish a return, but if they do and the form is incomplete or inaccurate the owner failing to make the return is under no penalty. But if he does furnish a return he must be treated as bound thereby. There need not be separate returns as to the land and the minerals. Sect. 26, sub-s. 2, is an enabling provision, and the requiring of a return is not a condition precedent to the Commissioners making and serving upon the owner a provisional valuation. It is admitted that, having regard to *Dyson v. Attorney-General* (1), the request to the appellants to furnish a return might have been disregarded by them. They did not disregard it, but made a return which must be treated as their return within s. 23, sub-s. 2.

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There is no necessity for any separate document to be served in respect of the minerals, and no particular form of return is prescribed by the Act. It need not be a return made in reply to a statutory form of request in order to make it a return within s. 23, sub-s. 2.

As to applying for a substituted capital value the appellants are out of time.

*Cave, K.C.*, in reply. The Commissioners must, if they require particulars, specify the parcels of land in respect of which the particulars are required: *Burghes v. Attorney-General*. (2)

Under s. 23, sub-s. 2, the return must be a return made in answer to a proper requirement for a valuation. A mere informal answer to a verbal question would not be a return within the sub-section.

By s. 27 the necessity of service upon the owner of a provisional valuation is without exception. Even if the effect of s. 23, sub-s. 2, is to fix the value at nil, still, under s. 27, a provisional valuation must be served upon the owner, because if it becomes binding then he can claim a substituted capital value.

*Cur. adv. vult.*

March 5. JOYCE J. delivered the judgment of the COURT (Lord Cozens-Hardy M.R., Phillimore L.J., and Joyce J.). The

(1) [1912] 1 Ch. 158.

(2) [1912] 1 Ch. 173.



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principal question in this appeal is whether the Inland Revenue Commissioners are entitled, in the circumstances of the case, to insist that by virtue of sub-s. 2 of s. 23 of the Act the minerals within or under certain lands of the appellants are to be treated as having no value as minerals on April 30, 1909.

These minerals were undoubtedly of some considerable value at that date. They have since been sold, and the Commissioners desire to claim one-fifth of the entire proceeds as increment value duty without any deduction from such proceeds of the value of the minerals on April 30, 1909, and without allowing the appellants to claim a substituted capital value under s. 2, sub-s. 3.

The answer to the question appears to depend upon whether the owners by the manner in which they filled up, or failed to fill up, Part II. of the copy of the now famous Form 4 which was served upon them, or with which they were supplied, have brought themselves within the operation of the enactment in s. 23, sub-s. 2, that the minerals shall be treated as having no value as minerals unless the proprietor of the minerals in his return furnished to the Commissioners specifies the nature of the minerals and his estimate of their capital value.

The Solicitor-General contended, among other things, that the Commissioners were not bound to require information or make any inquiry from any owner at all, but upon their own motion, and with such information, if any, as they may have or collect aliunde and without any communication with the owner, were at liberty to proceed to make and serve notice of their provisional valuation.

True it is that the statute does not in so many words enact that the Commissioners shall require any return from the owner, nor does it prescribe the form of the notice by which any return is to be required. But it is the scheme of the Act that returns should be made in compliance with the notices or a notice from the Commissioners, which of course to be effectual must be a proper notice (s. 26, sub-s. 2). The Act assumes that a return will be made, and unless this were so, s. 23, sub-s. 2, would be unintelligible. For the purposes of the Act there cannot be a return unless there has been a notice for it to be made, and in

the absence of such notice there could not of course be any default to make a return.

At all events, the particular enactment in s. 23, sub-s. 2, relied upon by the Commissioners in the present case cannot operate unless there has been a return by the proprietor furnished to the Commissioners—or possibly in the event of a wilful default to make a return in compliance with a proper notice. In reference to the present case, however, it is not necessary to consider how matters would stand if the proprietor declined or wilfully failed, upon a proper notice, to make a return within the time by law prescribed or allowed.

Now for the purposes of valuation all minerals are to be treated as a separate parcel of land. The copy of Form 4 supplied to the owners in the present case was not in our opinion a valid or proper notice requiring a return with respect to the unworked minerals. It incidentally referred to them, but the only land—we do not forget that land includes minerals—with respect to which the owners were required to furnish particulars was “house premises and land,” the description of which (apparently taken from the rate-book), as being in the occupation of Prebble, specifies the premises with respect to which the return was required. The form, considered as a notice to furnish particulars under s. 26, sub-s. 2, does not relate to the unworked minerals which for the purposes of valuation are to be treated as a separate parcel.

Objections to this form—I mean the copy supplied to the owners,—considered as a notice requiring particulars of the unworked minerals, were referred to during the argument. They are many and obvious. It is not necessary to occupy time in specifying them. In the supplement to a well-known text-book (Devonshire and Samuel on Duties on Land Values, Supplement, p. 21) there is an official form of notice (Form 6, Land Values. Unworked Minerals) which appears to be more appropriate and possibly, with some slight modifications, the form applicable to the case of the appellants, and we have obtained from the Inland Revenue prints of this form, as also of the form of provisional valuation of minerals treated as a separate parcel.

In our opinion the copy of Form 4 supplied to or served

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upon the appellants was not a proper or intelligible mode of requiring a return of particulars respecting the minerals, and certainly it did not treat them, as the Commissioners were bound to do, as a separate parcel of land. By ninety-nine people out of a hundred it would not be understood as a notice to furnish a return with respect to unworked minerals. It would require not merely a lawyer, but one of exceptional ability and caution, to understand the relevance of Form 4 and the documents that accompanied it to the unworked minerals. And we do not hesitate to conclude that the return as actually made by the appellants to Form 4, with respect to the surface of their lands,—for that is all that it really is—was not the return of the owners referred to in s. 23, sub-s. 2. In fact there has not at present been any such return in the present case, nor any sufficient or valid notice from the Commissioners requiring such a return.

The appellants in our opinion are entitled, with respect to the unworked minerals in question, which for the purposes of the valuation under the Act must be treated as a separate parcel of land, to make a return upon a proper form in pursuance of a proper notice from the Commissioners for the purpose, and to have a separate provisional valuation of the minerals in question, or, in other words, a valuation of such minerals treated as a separate parcel of land, the regular printed form for which is well known.

When this has been done, we are not aware of anything to preclude the appellants from having a substituted capital value pursuant to s. 23, sub-ss. 1 and 4, and s. 2, sub-s. 3, as amended by the Révenue Act, 1911, s. 2. Although it is not necessary for the purpose of the decision in the present case, we think it desirable to add that we do not agree with the view expressed by Warrington J. that there can be no substituted capital value if the value of the minerals is treated as nil under s. 23, sub-s. 2.

The result is that this appeal succeeds. The order of the Court below, dismissing the action, must be discharged. There must be a declaration that the Commissioners are not entitled to treat the return made by the appellants upon the Form 4 served upon them, or with which they were supplied, as the

return referred to in s. 23, sub-s. 2, of the Act, and a declaration that the appellants are entitled to have a provisional valuation of their unworked minerals treated as a separate parcel of land.

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Solicitors: *Roy & Cartwright; Solicitor of Inland Revenue.*

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[1914 H. 1290.]

Feb. 18, 19,  
22;

March 16.

*Insurance—Industrial Society—Life Assurance—Payments on Death of Members—Policy on Human Life—Deposit—Ultra vires—Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 1 (a); s. 2, sub-s. 1; s. 30 (a).*

The plaintiff was a member of an industrial society, and had received from them a share book, a membership card, a purchase book (in all of which her name and address were given), and a copy of the rules of the society. By the rules as amended it was provided that the objects of the society should include power to carry on the business of insurance as provided in rule 14A. By rule 14A the committee of management were authorized to appropriate money (inter alia) "for providing a sum to be paid on the death of a member or the wife or husband of a member, such sum to be proportional to one year's average purchases of the member from the society during the three years immediately preceding death." The society advertised "free life assurance" as an inducement to persons to become members.

The plaintiff alleged that the society had paid large sums of money in respect of this life assurance, and that they were carrying on the business of life assurance within the meaning of the Assurance Companies Act, 1909, without having paid the deposit of 20,000*l.* required by s. 2, sub-s. 1, of that Act, and brought an action to restrain them from doing so:—

*Held* (dissentiente Phillimore L.J.), that the society had done nothing ultra vires; that there had been no carrying on of life assurance business within the meaning of the Act of 1909; policies must be in writing and no policy had been issued, no premium had been paid; there was no obligation on the society to appropriate any further sum to the insurance fund, and the arrangement might at any moment be terminated by a general meeting.

Decision of the Vice-Chancellor of the County Palatine of Lancaster reversed.

APPEAL from a decision of the Vice-Chancellor of the County Palatine of Lancaster.



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The plaintiff was a member of and the holder of one fully-paid share of the defendant society, and the society had issued to her a share book, a membership card, a copy of its rules, and a purchase book. The defendants, the Toxteth Co-operative Provident Society, Limited, were an industrial and provident society established in the year 1891 and duly registered under the Industrial and Provident Societies Acts. Their registered office was in Liverpool, and they carried on many different trades, had upwards of thirty branch establishments, and 10,500 members. By the rules of the society it was provided (inter alia) as follows :—

“1. The name of the society shall be the ‘Toxteth Co-operative Provident Society Limited,’ and its objects shall be to carry on the trades of general dealers, both wholesale and retail, also of manufacturers, with power to purchase, hold, sell, mortgage, rent, lease, or sub-lease land of any tenure, and to erect, pull down, repair, alter, or otherwise deal with any building thereon. The society shall also have power to make advances to members for the building of house property and for the purchase of land.”

“Admission of Members.

“3 [as subsequently amended]. No person shall be admitted as a member of this society except by the committee of management. Every person desiring to join the society shall enter his name, place of residence, and occupation in a book or form provided for the purpose, and pay an entrance fee of 3*d.*, which, together with all fines, shall be appropriated to the reduction of fixed stock, and shall pay 3*d.* for a copy of the rules and share book, and on his election shall take at least one share. A society or company may be admitted as a member by any general meeting or meeting of the committee of management upon the same terms as an individual member, or upon other such terms consistent with the Industrial and Provident Societies Act, 1893, as the resolution for admission prescribes. Members changing their place of residence shall give notice of such alteration at the registered office within fourteen days.

“Immediately the first share is fully paid up each member shall be supplied with a card, upon which shall be written his name and registered number, which card it shall be necessary

for him to produce to entitle him to be present at any meeting of the society, subject to rule 22.

"In the event of a member's share book being lost, notice must be given at the registered office as soon as possible; and in one month from that notice, on giving satisfactory proof of identity and on payment of 3*d.*, a new book will be issued."

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"Division of Profits.

"14. The net profits shall be ascertained after paying or providing for (1.) all expenses of management; (2.) interest on paid-up capital at 5 per cent. per annum; (3.) interest on loan capital (rate to be fixed by members at a quarterly meeting, but not to exceed 5 per cent. per annum); (4.) depreciations as follows, viz.:—On fixed stock at not less than 10 per cent., on live and rolling stock at not less than 20 per cent., on buildings at not less than 1 per cent., all per annum on the nominal values thereof as appearing in the books; (5.) such other sums as any quarterly meeting may vote for the objects of the society; (6.) reserve fund, and for any other purpose which the general meetings may from time to time direct; (7.) any other sums the committee consider necessary for contingencies, or to equalise dividends; (8.) 1½ per cent. to the educational fund, and the remainder shall be divided amongst the members and non-members in proportion to their purchases from the society during the quarter in which the profits were accumulated (but non-members shall only receive one-half the rate which is allocated to members). Such dividend may be withdrawn or transferred to his share account at his option; but if not applied for during dividend days it shall be transferred to share account, and shall thereafter only be withdrawable in accordance with rule 8.

"The educational committee shall be held responsible to the quarterly meetings of the society for the proper disposal of the fund placed under their care, and shall not be allowed to vote away any portion thereof to be spent or disposed of by any other party."

"Making, Altering, or Rescinding Rules.

"37. No new rule shall be made, nor any of the rules herein contained or hereafter to be made shall be amended, alte ed, or

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rescinded, except by two-thirds of the votes given by the members present at a general meeting of the society specially called for that purpose, notice whereof shall be given as per rule 23. No amendment of rules is valid until registered."

On October 31, 1911, new rules were passed as follows:—

" Partial Amendment of Rules.

"Rule 1.—At the end of last line add 'and to carry on the business of insurance as provided in rule 14A.'

"Rule 14, as amended 1906, 1908, and 1911.—Add after (6.) reserve fund, 'to an insurance fund by such appropriation as the general meetings may from time to time determine.'

"Rule 14A (Insurance Fund).—The committee of management may from time to time invest in any manner permitted by the rules of the society, or may appropriate out of any investment so made, or from the profits of the business, such amounts as are authorised by the general meetings of the society, to form a fund for insuring the buildings, fixtures, and stock against losses by fire, or otherwise; also for providing a sum to be paid on the death of a member, or the wife or husband of a member, such sum to be proportioned to one year's average purchases of the member from the society during the three years immediately preceding death. No payment to be made on account of any person whose membership has not extended for a period of twelve months. The committee of management may, as they deem advisable, insure any of the property of the society, or property mortgaged to the society, or property belonging to the members of the society, wholly or in part, in the insurance fund, and thereupon shall pay to such insurance fund the premium which would otherwise be payable to some insurance company if therein insured to a similar amount. There shall not be anything taken at any time from the insurance fund other than payment of claims as provided for by this rule."

These amendments were registered under the Industrial and Provident Societies Act, 1893, on January 26, 1912.

The purchase book issued by the society to the member, in which the date and amount of each purchase was entered, contained the name and address of the member to whom it was

issued and the registered number of that member. The "Member's Share Book" issued to each member contained his name, address, and registered number; notices as to matters affecting the shares and interest, and that the books must be handed in at the close of each quarter; and contained spaces for entries as to shares allotted, capital withdrawn, fines and deductions, present share capital, and the initials of an officer of the society. By the card filed on application for membership the applicant stated his name, address, and occupation, and agreed to make the payments required and otherwise to be bound by the rules.

During the years 1913 and 1914 the society extensively advertised by means of handbills, posters affixed to windows of its premises, half-yearly reports, quarterly reports, and in particular in its issue of the *Wheatsheaf* magazine for the month of July, 1914, wherein it announced "free life assurance," that it paid 4s. in the pound on the average twelve months' purchases on the death of a husband of a member, and that the more a member purchased from the society the greater would be the benefits obtainable therefrom.

The plaintiff alleged that the society had paid large sums of money in respect of life assurance, and contended that it was carrying on the business of life assurance within the meaning of the Assurance Companies Act, 1909, without having paid the deposit of 20,000*l.* required by s. 2, sub-s. 1, of that Act, or receiving an exemption from the Board of Trade; and brought this action, in which she claimed: (1.) A declaration that the purchase books issued by the defendant society to its members either alone or together with the rules of the society were policies of assurance on human life and were illegal and ultra vires and void. (2.) Alternatively to (1.), a declaration that the purchase books together with the membership cards issued by the society and the rules of the society were policies of assurance on human life and were illegal, ultra vires, and void. (3.) A declaration that the instruments showing the amounts of the purchases made from the society by its members and issued by the society to its members either alone or together with the rules of the society were policies of assurance on human life, and were illegal and ultra vires and

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void. (4.) Alternatively to (3.), a declaration that the said instruments together with the said membership cards and rules were policies of assurance on human life, and were illegal and ultra vires and void. (5.) An injunction to restrain the society, its agents and servants, from issuing any further policies of assurance on human life and from carrying on the business of life assurance. (6.) An account.

The Vice-Chancellor held that the society were carrying on the business of life assurance and ought to be restrained from so doing.

The society appealed.

*P. O. Lawrence, K.C.*, and *J. Rutherford*, for the appellants. The question is whether the appellant society is carrying on life assurance business. We submit that it is not. What it is doing merely amounts to the allocation of a portion of its surplus profits in a certain way for the benefit of its members. Under the Act of 1893 any legal object is allowable for the allocation of profits. There is no restriction or limitation under the Act upon the power to alter the rules, so long as such alteration is within the Act. In this case a two-thirds majority of the members can alter the benefits to be given and even take them all away. Even rights which have become vested and accrued can be taken away by a proper alteration of the rules. Of course if the circulars constitute a contract then different considerations would arise.

[*PHILLIMORE L.J.* In the committee's report for 1914 reference is made to the allocation of 500*l.* to the insurance fund. Could that be altered?]

Certainly. The society could appropriate the fund in any way they liked so long as they properly passed a rule for that purpose: *Burke v. Amalgamated Society of Dyers* (1); *Smith v. Galloway*. (2) Under the rules as they stood when the plaintiff joined the society there was no obligation to devote any sum to the payment of any member on death.

Rule 14 provides for the division of profits in certain ways. There is no obligation to pay to any member an ascertained

(1) [1906] 2 K. B. 583.

(2) [1898] 1 Q. B. 71.

definite sum. The society is not carrying on life assurance business within the Assurance Companies Act, 1909 (9 Edw. 7, c. 49). (1) The Vice-Chancellor founded himself on *Nelson & Co. v. Board of Trade*. (2) That was a case of granting annuities on human life. This is not that case at all.

Sect. 30 of the Act of 1909 provides: "(a) 'Policy on human life' shall mean any instrument by which the payment of money is assured on death (except death by accident only) or the happening of any contingency dependent on human life, or any instrument evidencing a contract which is subject to payment of premiums for a term dependent on human life." This society is not within that. It does not issue any policies on human life. There is here no instrument within the section.

Rule 3 prescribes that a member on being admitted shall enter his name, place of residence, and occupation in a book or form provided for the purpose.

(1) Assurance Companies Act, 1909, s. 1:—

"This Act shall apply to all persons or bodies of persons, whether corporate or unincorporate, not being registered under the Acts relating to friendly societies or to trade unions (which persons and bodies of persons are hereinafter referred to as assurance companies), whether established before or after the commencement of this Act and whether established within or without the United Kingdom, who carry on within the United Kingdom assurance business of all or any of the following classes:—

"(a) Life assurance business; that is to say, the issue of, or the undertaking of liability under, policies of assurance upon human life, or the granting of annuities upon human life;

"(b) Fire insurance business; that is to say, the issue of, or the undertaking of liability under, policies of insurance

against loss by or incidental to fire."

Sect. 30. "Where a company carries on life assurance business, this Act shall apply with respect to that business, subject to the following modifications:—

"(a) 'Policy on human life' shall mean any instrument by which the payment of money is assured on death (except death by accident only) or the happening of any contingency dependent on human life, or any instrument evidencing a contract which is subject to payment of premiums for a term dependent on human life;

"(b) Where the company grant annuities upon human life, 'policy' shall include the instrument evidencing the contract to pay such an annuity, and 'policy holder' includes annuitant."

(2) (1901) 84 L. T. 565

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Under the Act 14 Geo. 3, c. 48, s. 2, a policy on life must contain the name of the person assured. There is nothing of that kind here.

*Newbold Friendly Society v. Barlow* (1) was a case under the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61). There it was held that a society whose members on paying subscriptions were entitled to receive sick pay and sums for funeral expenses incurred on the death of their children was not within the definition of "company" in s. 2 of the Act as being persons "who issue or are liable under policies of assurance upon human life." That Act was very like the Act of 1909.

[PHILLIMORE L.J. Is not the little book issued by your society evidence of a contract that the member shall have all the benefits of a shareholder including a policy of assurance on payment of premiums?]

That would necessitate the reading into the rules of many other things. What is done by this society is not what is aimed at by the Act of 1909. Here the payments to members are quite independent of the life of the person who takes out the so-called policy. That is not like what was done in *Joseph v. Law Integrity Insurance Co.* (2)

It cannot rightly be said that a trading company like this which merely sets apart a sum out of its profits to be devoted to the payment to members on death is carrying on the business of life assurance. By a legitimate alteration of the rules the whole system may be changed to-morrow and the profits allocated in a different manner. The society is in the same position as an ordinary partnership firm who chose to do this.

It cannot be said that the premiums (if there be any) in this case could be deducted by the member from his assessment to income tax as in *Gould v. Curtis*. (3) This is merely an appropriation of profits between members or partners which they can alter as they like.

In *Carlill v. Carbolic Smoke Ball Co.* (4) Lindley L.J. ridiculed the idea of the contract in that case being called a policy. He would have taken the same view of this case.

(1) [1893] 2 Q. B. 128.

(2) [1912] 2 Ch. 581.

(3) [1912] 1 K. B. 635.

(4) [1893] 1 Q. B. 256.

Here whatever rights the advertisements issued by the society may give they are not policies on human life. What is held out in the advertisements is immaterial. It is what is actually done by the society which is material.

The reason for requiring the deposit of 20,000*l.* was to protect the public. That reason does not apply to this society having regard to rule 14A. It is said that four separate and distinct documents combine here to make an instrument evidencing a contract. They cannot be so read together. Taking them separately no one of them can be regarded as a policy of assurance on human life.

*Jenkins, K.C.*, and *H. Mather*, for the respondent. This is an action by a member of the society who alleges that the business is being carried on in a manner which is ultra vires the society, or in the alternative in a manner which is illegal. If the true legal position be as described by the appellants then the society is carrying on business in a dishonest manner, there being, however, no imputation upon the honesty of those who are carrying it on.

It is said that rule 14A only relates to profits. But that is not so. The committee may appropriate capital or investments. Rule 1, as amended, gives power to carry on the classes of insurance specified in rule 14A.

Assuming that the society have power to carry on this business, have they done so? Upon that the advertisements are important. Suppose a person on the faith of the advertisements becomes a member and it is found that the committee have not set apart any fund, his legal personal representatives would have the right to sue the society. A policy need not be in any particular form. There is no rule or statement of law that it may not be by parol. Apart from statute a contract of assurance need not be in writing: *Bunyon on Life Assurance*, 5th ed. p. 69. Any contract of insurance comes within the word "policy." If a contract of insurance is created by any binding means that is a "policy": *In re Norwich Equitable Fire Assurance Society*. (1)

Under s. 30 of the Act of 1909 these documents issued by the

(1) (1887) 57 L. T. 241.

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society are instruments whereby the payment of money is assured on death. The question here is whether this society invited people to become members on the faith of the advertisements. It is admitted that if this is merely a contract between the members to divide profits in a certain way the plaintiff's case must fail, but whatever the powers of the society are they have intended and offered to do something which is ultra vires.

[LORD COZENS-HARDY M.R. Has the plaintiff a policy?] That is immaterial.

[JOYCE J. I think it is most material.]

The advertisements are intended to lead to business relationships and are therefore instruments. The general words of the Act of 1909 must have a reasonable interpretation put upon them. Rule 14A gives power to carry on insurance business within limits; and the details of the scheme are to be found in the resolutions of the society passed on October 31, 1911, under which they have done business. It is immaterial whether the advertisements were correct or not; they claim to carry on insurance business generally. That is not provided for by the rules and is ultra vires, and it is illegal within the Act of 1909. The question is not what this society ought to have done but what have they in fact done. It is clear that they have been carrying on a life assurance business. The decision in *Nelson & Co. v. Board of Trade* (1) is in our favour. The society have received premiums in the shape of purchase-money for goods, and issued policies in the form of the rules, purchase books, members' share books and cards, which must be read together. Therefore the society are acting ultra vires—*Joseph v. Law Integrity Insurance Co.* (2)—and also carrying on a business which is illegal under the Act of 1909.

*P. O. Lawrence, K.C.*, in reply referred to the Industrial and Provident Societies (Amendment) Act, 1913, s. 2.

*Cur. adv. vult.*

March 16. LORD COZENS-HARDY M.R. This is an appeal from the decision of the Vice-Chancellor, who has declared that the

(1) 84 L. T. 565.

(2) [1912] 2 Ch. 581, 593.

defendant society is carrying on the business of life assurance within the United Kingdom within the meaning of the Assurance Companies Act, 1909, and has made default in depositing in Court 20,000*l.* as required by the Act. It is necessary to consider the provisions of the Act referred to. It applies (s. 1) to every corporation carrying on within the United Kingdom (a) life assurance business; that is to say, the issue of or the undertaking of liability under policies of assurance upon human life. By s. 30 (a) “ ‘policy on human life’ shall mean any instrument by which the payment of money is assured on death (except death by accident only) or the happening of any contingency dependent on human life, or any instrument evidencing a contract which is subject to payment of premiums for a term dependent on human life.” Now it is clear that a policy within the meaning of the Act must be in writing or at least be evidenced by writing. The Life Assurance Act, 1774, provides this, and the use of the word “instrument” in s. 30 conclusively shows it.

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It is now necessary to consider the nature of the defendant society and what it is that they are doing which is said to amount to a carrying on of life assurance business. The defendant society is an industrial and provident society duly registered under the Act of 1876. Its objects as defined by the rules are to carry on the trades of general dealers, both wholesale and retail, and it appears to be a highly prosperous company. By rule 14 the net profits are to be applied in paying or providing for (1.) expenses of management; (2.) and (3.) interest on paid up capital and loan capital; (4.) depreciations; (5.) “such other sums as any quarterly meeting may vote for the objects of the society”; (6.) a reserve fund for any purpose whether charitable, philanthropic, of public utility, or any other purpose whether within the objects for which the society is formed or not; (7.) any other sums the committee consider necessary for contingencies; and (8.)  $1\frac{1}{4}$  per cent. to the educational fund and the remainder to be divided amongst members and non-members in proportion to their purchases from the society, but non-members are only to receive half the rate which is allocated to members.

The society for some years effected what is described as a

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collective policy with the Co-operative Insurance Society, Limited, to provide for each member who should die during the currency of the policy 4s. in respect of each 1l. of his average purchases. No question arises on this policy. It occurred, however, to the managers that it might be advantageous to drop this policy and to arrange for equivalent benefits to be given to members out of the profits of the company, and on October 31, 1911, new rules were passed by adding to rule 1 the words "and to carry on the business of insurance as provided in rule 14A," and by adding to rule 14 after "(6.) reserve fund" the words "to an insurance fund, by such appropriation as the general meetings may from time to time determine." Rule 14A was a new rule headed "Insurance Fund." It authorized the committee of management to form a fund (inter alia) for providing a sum to be paid on the death of a member or the wife or husband of a member, to be proportioned to one year's average purchases of the member from the society during the three years immediately preceding death. On June 8 it was resolved that the benefits of the collective assurance scheme be extended so as to provide for the payment of 2s. in the pound on purchases on the death of married women members or the wives of male members. All these new rules have been registered under the Act. The defendant society is not subject to the statutory restrictions imposed by the Companies Acts; the members can apply both income and capital to any purpose they think fit. A person desiring to become a member applies to the committee, pays 1l. for a share, and receives a membership card in which his or her name is inserted and a registered number, together with a member's purchase book in which the amount of purchases is entered. There is no other document of any kind except so far as the rules may be considered a document.

These being the admitted facts, I think there is no carrying on life assurance business within the meaning of the Act. No policy has been issued, no premium has been paid, there is no obligation upon the society to appropriate any further sum to the insurance fund. It seems to me that it is an abuse of language to call the membership card a policy or an instrument evidencing a contract. The arrangement seems to me to lack every element

necessary to constitute carrying on the business of life assurance. It is nothing more than an appropriation of income, or possibly of capital, which may at any moment be terminated by the general meeting. In my opinion the decision of the Vice-Chancellor cannot be supported, and the appeal must be allowed. The Vice-Chancellor was apparently under the impression that the arrangement was intended to include non-members as well as members. But this was a mistake. It is not suggested by the plaintiff that anything has been done outside of or beyond rule 14A.

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I cannot part with the case without referring to advertisements and notices issued by the society which are inaccurate, misleading, and highly improper. They represent that "free life assurance" is a benefit which they confer, or, in another document, that "the life of every member is assured free of charge." The effect of these untrue statements has been, apparently largely to increase the number of members. I was glad to receive from the society's counsel a distinct assurance that no such statements will in future be made. But however reprehensible they may be, it seems to me that they cannot by calling something which is not an assurance by that name make it a policy of assurance within the meaning of the Act. The result is that in my opinion the appeal must be allowed and the action dismissed with costs here and below.

PHILLIMORE L.J. The appellant society is a large co-operative body registered under the Industrial and Provident Societies Act, having shareholders and being governed by rules. It makes large profits which under the Act it may apply in any manner it desires and for the disposition of which it has made rules. These rules can be altered from time to time at a special general meeting convened by seven days' notice by a majority of two-thirds of the members then present and by the alteration being registered with the Registrar of Friendly Societies.

As the rules stand at present the distribution of profits is regulated by rules 14 and 14A, and there are nine objects. The first four need not be mentioned; they relate to provisions for good management. The fifth allows a payment of such other sums as



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 1915 The sixth payment to a "reserve fund, and for any other  
 HAMPTON purpose which the general meetings may from time to time  
 v. direct." The seventh payment is "to an insurance fund by  
 TOXTETH such appropriation as the general meeting may from time to  
 CO-OPERA- time determine." The eighth and ninth allow the setting aside  
 TIVE of money for contingencies or to equalize dividends, and the  
 PROVIDENT payment of a small percentage to the educational fund. The  
 SOCIETY, remainder is to be divided "amongst the members and non-  
 LIMITED. members in proportion to their purchases from the society  
 Phillimore L.J. during the quarter in which the profits were accumulated (but  
 non-members shall only receive one half the rate which is  
 allowed to members)."

The introduction of a payment to an insurance fund was made in October, 1911, and registered in January, 1912, by certain partial amendments of rules. Rule 1 was amended by stating as one of the objects "and to carry on the business of insurance as provided in rule 14A." Rule 14 was amended as already stated. Rule 14A provides for the working out of this business.

Before this additional business was taken on by the society it had been in the habit for some time of effecting on behalf of its members an insurance with an ordinary insurance society, providing that its members, other than married women, should, in the event of death, be entitled to a sum equalling 4s. in the pound on one year's average purchases of the member during the three years preceding his death, provided that the membership had been for at least twelve months, and for a similar benefit in the event of the death of a member's wife. There was at some time superadded a provision intended to benefit older people by extending the average over several years up to seven.

By resolution of a special meeting held on October 31, 1911, when the alteration of the rules necessary for the adoption of the assurance business was carried, it was determined that the society should carry out the scheme on "the same lines as at present prevail." And this has been done, with a further addition passed on June 8, 1914, giving half the same benefit to married women members or the wives of male members.

What happens, therefore, is that, putting aside the various charitable contributions, payments to reserve and educational funds, and so forth, the profits are divided as follows:—Members and non-members (non-members only getting half what members get) receive a sum in proportion to their purchases during the quarter; and members only or their wives (the wives getting half) receive at death, or at the death of the wife (and the husband has an insurable interest in his wife's life), a sum of money, provided that the membership exceeds a twelvemonth. This sum equals 4s. in the pound on the average purchases of one year, averages being calculated as I have already described.

It is contended that a portion of the price paid by a member for every article purchased, being a portion of the excess of the price over cost price after the other portions of the excess have been dealt with, is a premium paid to insure a sum at death, and none the less so because the premiums may be paid for a short term only, or even one premium only may be paid. I think this is right. It is an insurance assuring, not, it is true, a fixed sum, but a sum fixed by proportion to the premium or premiums paid and accruing at death; and, though it is usual to insure a fixed sum and to have a fixed single or annual premium, there is nothing to prevent an arrangement by which, the proportion of premium to the sum to be assured being ascertained, the assured should be allowed to increase his premium and proportionately increase the sum assured.

In the case of *Nelson & Co. v. Board of Trade* (1) it was held that the arrangement there made was one which fell under the Assurance Companies Act. Lord Alverstone C.J. said: "A portion of the price paid for the tea is the money which Messrs. Nelson can use for the purpose of insuring the annuities to these widows." And again: "In the face of these facts it is, in my mind, quite impossible to come to any other conclusion than that, in connection with this tea trade, Messrs. Nelson are carrying on what may be a very desirable scheme of insurance, in a very profitable method to them, and also a very desirable and advantageous system to people who buy tea, of granting annuities which become effective on the death of the husband.

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Now the words of the section to which our attention has been called are 'who issue or are liable for policies of assurance on human life, or who grant annuities upon human life within the United Kingdom.' Now, I do not think that the argument based upon what is a policy within the Act of George III. had any real relation to the subject. But even if it had, the latter words 'who grant annuities upon human life' are obviously applicable because this is to be an annuity for the life of the widow, to commence on the death of the husband."

It is said, and said truly, that this decision might have rested upon the words of paragraph A of s. 1 of the Act, which places among the items of life assurance "the granting of annuities upon human life." But the language of the Lord Chief Justice goes further, and indeed the annuities in the *Nelson Case* (1) were deferred or reversionary annuities accruing upon the death of the husband and lasting for the life of the widow. A policy by A. to secure an annuity upon his death for B. is a well-known form of insurance business. Where the transaction effected is carried out on exact actuarial principles the probable duration of the annuity and the capital value which would represent it on the death of A. is the assured sum on which the premium to be paid by A. is calculated. I think that the Lord Chief Justice was right in treating—as I think he did—the arrangement in *Nelson's Case* (1) as an insurance arrangement quite apart from the fact that the payment upon death took the form of an annuity. As I have said, I think the business which the society carries on is one of life assurance. Whether it comes within the Act is a further question.

Before I go into that, it is said that this society is not carrying on assurance business because it can, at any moment, rescind a simple resolution, and that rules 1 and 14 depend upon rule 14A, and all three could be amended by a two-thirds majority at a special meeting summoned at seven days' notice, with only a brief subsequent delay for registration; and that every member is bound by the rules of the society and contracts only for the contingent chance of the rules remaining unaltered. Now the important parts of rule 14A are as follows:—" (Insurance Fund).

(1) 84 L. T. 565, 567.

—The committee of management may from time to time invest in any manner permitted by the rules of the society, or may appropriate out of any investment so made, or from the profits of the business, such amounts as are authorised by the general meetings of the society . . . . for providing a sum to be paid on the death of a member or the wife or husband of a member, such sum to be proportioned to one year's average purchases of the member from the society during the three years immediately preceding death. No payment to be made on account of any person whose membership has not extended for a period of twelve months. . . . There shall not be anything taken at any time from the insurance fund other than payment of claims as provided for by this rule."

It appears to be the practice to vote half-yearly a sum for the insurance fund (which fund appears in the report and balance-sheet for the half-year ending July 27, 1914, as amounting to 922*l.* 11*s.* 10*d.*) and independently to pass the sum actually paid for claims in the past half-year.

It may be, I would assume it, that even when a sum of money has been voted for the half-year to the insurance fund, or there is a sum credited to the insurance fund, a member claiming in right of his wife, or the executors of a deceased member dying during that half-year, might, if a special meeting so resolved, find his insurance destroyed without even a claim to a share in the sum voted in the standing fund. But no vote could take away a claim which had attached by death; and there is always the contingency—I might say the probability—that no vote altering the system will be passed. It seems to me that a contingent life assurance is none the less, until the contingency is adversely determined, a life assurance, and I put aside the argument of uncertainty raised on behalf of the society.

This being so, I have no need to consider the effect of the advertisement by which the society holds itself out to all prospective members as assuring the lives of members free of charge. The only weight I give to it is that, inasmuch as I think a member who could prove that he contracted on the faith of that advertisement would, notwithstanding rules, be entitled to damages if he did not get the benefit, it is therefore very

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I have now to consider whether this is life assurance within the Act. For this purpose the definition is "the issue of, or the undertaking of liability under, policies of assurance upon human life." I think it is "the undertaking of liability of assurance upon human life," and none the less because the system is one of mutual insurance. It is suggested that it is merely a division of profits; but this is the case with all mutual insurance societies. The profits first go in paying life claims. If there is more than enough the rest of the profits after making all due provision goes in bonuses. The statute, however, appears to require that the undertaking should be by a policy. A policy is defined by s. 30 (a) as follows:—"Policy on human life" shall mean any instrument by which the payment of money is assured on death (except death by accident only) or the happening of any contingency dependent on human life, or any instrument evidencing a contract which is subject to payment of premiums for a term dependent on human life."

Now a policy is none the less a policy for the purposes of this Act because it is issued in an illegal or insufficient form. If the document be without the stamp, or if (as I think it does not) it came under the prohibition of 14 Geo. 3, c. 48, because the name of the life assured was not expressed, the society cannot rely upon these additional illegalities as a defence to a charge that it is illegally carrying on business without having an adequate insurance fund. The mischief would only be the greater. I think Lord Alverstone means to say this in the passage I have already quoted; at any rate I am prepared so to hold.

Now there are various documents which have been suggested in the course of the case as constituting the policy. Out of these documents or instruments I should point out one—the member's share book. The ticket which is a kind of ambulatory share book falls into the same category. Now by virtue of the rules every member is entitled to this assurance. He signs an application which is equivalent to a proposal form. He then gets his share book, which states his share or shares and which states his name, and therefore probably sufficiently complies, if it were

necessary, with the Act of George III., and the fact that shares are allotted is verified by the initials of an officer of the society put in a column provided for this purpose. There is no special premium, that being a proportion regulated by the rules. If it were necessary, which I think it is not, that the rules should be expressed to be incorporated, there is a sufficient incorporation in the notices that appear on the front page. As the premium, by the rules, is at the volition of the member, and as the relation of the sum assured to the premium is regulated by the rules, I do not see anything further that is required except the stamp duty. As the society in times past effected an assurance for their members, so now it insures them.

I cannot part with this case without referring to an argument for the society which at one time had weight with me. It was suggested that if this principle were carried so far, every partnership deed with a clause providing for a payment of a sum of money to the executors of a partner upon his death would be life assurance. I think there are two answers. The first is a sufficient one. It is not a single act of contract for payment of a sum of money upon death that makes one "carry on life assurance business." The second answer is, I think, that by partnership law a partnership must be wound up upon the death of a partner, and this provision is not a provision for paying a sum of money upon the death of the partner, but a provision whereby the partner contracts for his executors that they will not put in force their rights to have the partnership dissolved, but will take a sum of money in lieu.

I regret that there should be a difference between the members of the Court, but for my part I think that this appeal fails.

JOYCE J. If the appellants are to be judged only by what their manager has been saying, it might be difficult to avoid the conclusion that they have been at least professing to carry on the business of life assurance. But it is admitted that they have not in fact done any business in the nature of life assurance, or in that direction, except what has been done among the members themselves under and in pursuance of the powers conferred by rule 14 as amended and rule 14A.

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The ultimate net residue of profits otherwise unapplied is distributable, not, as in an ordinary company, in dividends on the share or shares held, but by division amongst the members and non-members in proportion to their purchases from the society during the quarter in which the profits were accumulated, non-members receiving only half the rate allowed to members. Recently—that is to say, during the last two or three years—the society, in exercise of the power conferred by the amended rules (January, 1912), has been giving to the representative of a shareholder who died, and to the shareholder whose wife or husband had died, in addition to his or her dividend, if any, calculated upon the amount of purchases for the current year at the time of the shareholder's decease, a further benefit or extra dividend, I may call it, “proportioned to one year's average purchases of the member from the society during the three years immediately preceding death.” And if there have been no such purchases no dividend of any kind whatsoever is paid, as I understand the matter.

Now the question to be determined is whether the society by giving this “extra dividend,” as I call it, has brought itself within the operation of the Act of 1909. That applies to all bodies of persons carrying on the business of life assurance, which for the purpose of the Act is defined to be “the issue of, or the undertaking of liability under, policies of assurance upon human life,” a term which under the Act includes or means “any instrument by which the payment of money is assured on death . . . or evidencing a contract which is subject to payment of premiums . . . for a term dependent on human life.”

The society does not issue, and never has issued, any policy. No one is interested or concerned in the matter but the members themselves, and in fact only those members that purchase goods. There is no contract except such as is to be found in the rules—the co-partnership agreement—between the members. There is no other instrument in the case.

Now the rules certainly do not contain or evidence any contract which is subject to the payment of premiums for a term dependent upon human life. There is no mention of premium in the rules. There are not any premiums. A purchase

of goods at the regular price, no doubt less than would have to be given at an ordinary shop, is not payment of a life assurance premium, even though the amount of the member's dividend, or of the "extra dividend" I have mentioned, if the member should happen to die or lose a wife or husband by death, may ultimately depend in some measure upon the amount of the member's latest purchases.

The society then is not within the Act unless there be some undertaking of liability under an instrument by which the payment of money is assured upon death. Is there by virtue of or under the rules any undertaking of liability to the member who loses husband or wife by death, or to the representative of any member who dies, or is there by the rules any payment of money assured upon death? I cannot find any such undertaking of liability in the rules or anything like it.

All that has been and is being done really comes to this and nothing more: the rules, without in any way prescribing it, empower the society in general meeting, after providing for a number of other things, such as expenses, interest on capital, depreciation, &c. (some optional and some otherwise), and before any dividend, to appropriate a portion of the money otherwise available for distribution as dividend to what is designated not very happily an "insurance fund"; and such is the existing practice. This fund, without distinguishing between capital and income, is applicable from time to time for what is termed, not quite accurately, the insuring the building, fixtures, and stock against losses by fire—for it is really not the insuring against, but the making good of such losses—and the providing of what I have referred to as the "extra dividend," in rule 14A described as "a sum to be paid on the death of a member or the wife or husband of a member, such sum to be proportioned to one year's average purchases of the member from the society during the three years immediately preceding death." It is really a repayment of a percentage on the aggregate amount of the price paid for such purchases.

The rules are complicated and ill drawn, but they do not impose upon the society any obligation to make any such payment as this which I have called "extra dividend." The next

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and every future general meeting in disposing of the profits might not see fit to allocate anything to the so-called "insurance fund." Without any alteration of the rules the society is entitled to discontinue it at any time. If nothing were voted for the purpose it would naturally come to an end. There is no rule directly or indirectly requiring it to be maintained or requiring any such payment as I have termed "extra dividend" to be made in the case of a member dying or losing wife or husband, nor is there any rule specifying the rate at which such payment, if any, is to be made. The representative of a deceased member is not entitled by law beyond his or her ordinary dividend, if any, and interest on paid-up capital, to insist upon any other payment, repayment, or benefit whatsoever, unless and only so long as the society thinks fit and chooses to make such payment, and then at such rate only as it may determine from time to time.

In the view that I take of the facts of this case no payment of money is assured upon death. There is no contract with any member to make such a payment. Besides, in any year there might be no profits, or no profits beyond what sufficed for the payment of expenses, interest on paid-up and loan capital, depreciation, and other items of expenditure that have to be provided for before anything is distributable among the members either as ordinary dividend or otherwise. The so-called "insurance fund" might be exhausted in making good the losses by fire.

The expectation, possibility, even the probability, more or less certain, of such a benefit upon death as the extra dividend accruing by reason of the general meetings continuing to vote money for the purpose does not in my opinion constitute a life assurance. The extra dividend is not assured. There is no debt or liability in respect of it unless or until the society chooses to appropriate money for the payment, if then. No Court could compel the society to allocate anything to the "insurance fund" or could determine how much if any part of the "insurance fund" should be applied otherwise than in providing for possible losses by fire.

The payment upon the occasion of a member's death or the

death of a member's wife or husband of what I call the "extra dividend," the practice of paying or giving which the plaintiff relies upon as having the effect of constituting the society a life assurance company, is something quite uncertain, merely incidental to the exercise of the unfettered powers of the general meeting of the members in reference to the disposition of the surplus profits, if any, derived from carrying on the society's business, which powers may from time to time be exercised in an entirely different manner by the general meeting for the time being. In point of law such payment, as it appears to me, is altogether voluntary on the part of the society.

The Act provides by s. 2, sub-s. 1, that "every assurance company shall deposit and keep deposited with the Paymaster-General for and on behalf of the Supreme Court the sum of 20,000*l.*," and by sub-s. 5 of s. 2 "The Paymaster-General shall not accept a deposit except on a warrant of the Board of Trade." For my own part I do not entertain any doubt that the Board of Trade was correctly advised when it issued the circular letter of April 25, 1911, or that co-operative societies with rules like those of the society in question in this case are not assurance companies within the Act. The result is that in my opinion the decision of the learned Vice-Chancellor ought to be reversed.

Appeal allowed.

Solicitors : *Hyman Isaacs, Lewis & Mills, for Herbert J. Davis & Co., Liverpool ; Carruthers & Collinson, Liverpool.*

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[1914 L. 1126.]

*Mortgage—Expectant Share as One of Next of Kin of living Person—Assignment of, by Way of Mortgage—Definite Item of Property—Bankruptcy and Discharge of Mortgagor before Falling into Possession of Share—Effect on Mortgage.*

In 1905 L., who as one of the next of kin of his mother was presumptively entitled to a share of her personal estate, assigned his expectant share to the N. Society by way of mortgage. In 1908 he assigned the same share to A. by way of mortgage subject to the mortgage of 1905. In 1908 he was adjudicated a bankrupt and in 1910 he received his discharge. Neither the N. Society nor A. proved in the bankruptcy. In 1911 L. assigned his expectant share to the I. Syndicate. In 1914 L.'s mother died, and the share thereupon fell into possession :—

*Held*, that the assignments of 1905 and 1908 operated so as to transfer the share on the death of the mother and did not merely impose a personal liability which could be affected by the bankruptcy.

*Held*, therefore, that the N. Society and A. were entitled in priority to the I. Syndicate.

*Collyer v. Isaacs* (1881) 19 Ch. D. 342 distinguished.

#### SPECIAL CASE.

The action was brought by the Industrials Finance Syndicate, Limited, against George McClintock Lind, the Norwich Union Life Insurance Society, and Henry Lewis Arnold, claiming by their writ (*inter alia*) (1.) a declaration that the plaintiffs as assignees of Hugh James Lawrence Lind (hereinafter referred to as Hugh Lind), the lawful son and one of the next of kin of Florence Lind, deceased, were entitled by virtue of an indenture dated May 29, 1911, and made between Hugh Lind of the one part and plaintiffs of the other part, and/or of an indenture of further assurance dated March 6, 1914, and made between the same parties to one equal tenth part or share of and in the personal estate of the said deceased, subject as to one moiety of the said share which should remain after payment of the costs, charges, and expenses mentioned in the said indentures to the trust thereby declared in

favour of the said Hugh Lind; (2.) that the defendant George McClintock Lind as administrator of the estate of the said deceased might be ordered to pay to the plaintiffs as such assignees as aforesaid the moneys representing the share of the said Hugh Lind in the said estate; and (3.) if in so far as might be necessary, administration of the personal estate of the said deceased.

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The parties subsequently concurred in stating a special case for the opinion of the Court, from which the following facts appeared:

Hugh Lind was at the time of the dealings in question one of the next of kin of his mother, Florence Lind, and presumptively entitled to a share in her personal estate. She died intestate on February 15, 1914.

By an indenture dated February 21, 1905, and made between Hugh Lind (thereinafter called the mortgagor) of the one part and the defendants, the Norwich Union Life Insurance Society, of the other part, the said Hugh Lind covenanted to pay 800*l.* and interest and certain premiums and other moneys to the society, and by the same deed he, as beneficial owner, assigned to the society in effect his then expectant share in his mother's estate, subject to a proviso for redemption in ordinary form.

By an indenture dated May 20, 1908, and made between Hugh Lind (said to be thereinafter called the borrower, but in fact sometimes described as the vendor) of the one part and the defendant Henry Lewis Arnold (thereinafter called the purchaser) of the other part, in consideration of 450*l.* paid to him by the purchaser the borrower covenanted with the purchaser to pay him on the death of Florence Lind (but only if the vendor should be then living) 1500*l.* with interest and certain costs and other moneys, and the borrower, as beneficial owner, assigned to the purchaser in effect his expectant share in the personal estate of Florence Lind subject to the mortgage of February 21, 1905, and to a proviso for redemption on payment of 1500*l.* and interest and other moneys. By the same deed the borrower did "irrevocably appoint the purchaser his executors administrators and assigns and each of them his attorney and attorneys in his name or otherwise but at his expense to ask demand sue for or otherwise to sue for receive and recover from the committee or



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the personal representative of the said Florence Lind and from any other person or persons body or corporation in whose hands or under whose control the same might be the premises hereinbefore conveyed and on the receipt thereof or any part thereof to give proper receipts and discharges for the same and generally for all purposes hereinbefore mentioned or connected with these presents and with power to appoint a substitute or substitutes and the borrower hereby ratifies and confirms and agrees to ratify and confirm whatsoever his said attorney and attorneys or any substitute or substitutes acting under him or them shall do or purport to do by virtue of these presents."

On the same day the defendant Arnold signed and gave to Hugh Lind a letter giving him the right to repurchase what was there called the reversionary charge upon certain terms.

On August 15, 1908, Hugh Lind was adjudicated a bankrupt, and on October 12, 1910, he obtained his discharge. Neither the society nor Arnold proved in the bankruptcy.

By a deed dated May 29, 1911, Hugh Lind in consideration of 260*l.* as beneficial owner assigned to the plaintiffs in effect his expectant share in his mother's estate subject to a trust thereby declared as to a moiety thereof for Hugh Lind himself.

After the death of Florence Lind, by a deed dated March 6, 1914, Hugh Lind by way of further assurance assigned to the plaintiffs the share to which he was then actually entitled.

On April 22, 1914, the defendant Arnold, purporting to act on the power of attorney contained in his mortgage, executed a similar assignment to himself of the share subject to the society's mortgage and to the proviso for redemption contained in his own mortgage.

Notices of the several deeds above mentioned were given to the defendant George McClintock Lind as administrator of Florence Lind, but nothing turned on the order in which they were given, and the details are therefore omitted.

The questions for the opinion of the Court were—(1.) whether the indenture of February 21, 1905, in the events which had happened, was a valid and effectual mortgage of the share and interest of Hugh Lind in his mother's estate; (2.) whether the indentures of May 20, 1908, and April 22, 1914, or either of

them were valid and effectual (a) assignments or assignment, or (b) mortgages or charges or mortgage or charge of the same share and interest; and (3.) and (4.) as to the priorities of the various parties inter se.

The case was heard by Warrington J. for Joyce J. on February 16 and 17, 1915.

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*Hughes, K.C.*, and *R. E. Moore*, for the plaintiffs. The assignments of 1905 and 1908 were inoperative as actual assignments or conveyances of the interest which Hugh Lind hoped or expected to acquire on the death of his mother as one of her next of kin. They were assignments of a mere expectancy, and were equivalent to contracts to assign the property if and when it fell into possession: *Collyer v. Isaacs*. (1) It cannot be suggested that during the lifetime of his mother Lind had anything more than an expectancy. An expectancy is not "property" within the definition of that term in s. 168 of the Bankruptcy Act, 1883. Therefore at the date of the bankruptcy the assignees had no security for their debts, but merely personal rights against the debtor under their contracts. These rights were provable in the bankruptcy and were released by the discharge: *Collyer v. Isaacs* (1); *Thompson v. Cohen* (2); *Cole v. Kernot* (3); *Lyde v. Mynn* (4); *Victor v. Victor* (5); Bankruptcy Act, 1883, s. 30; s. 37, sub-ss. 1, 3, 8. The rights therefore having been released the security, if it can be called a security, is also gone. *In re Reis* (6), which was a case of a covenant in a marriage settlement to settle after-acquired property, shows that other considerations may apply in such a case. If the plaintiffs are right on this point the securities of the Norwich Union and Arnold are gone. If, however, Arnold is held to be wrong on this point, he relies on the deed executed by him in April, 1914, under his power of attorney. As to this it is submitted, first, that the power did not extend to enable him to execute a document of that kind, and, secondly, that if it did he could only do what his principal could have done, and that at the date of

(1) 19 Ch. D. 342.

(2) (1872) L. R. 7 Q. B. 527.

(3) (1872) L. R. 7 Q. B. 534, n.

(4) (1833) 1 My. & K. 683.

(5) [1912] 1 K. B. 247.

(6) [1904] 2 K. B. 769.

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the deed in question the principal had parted with his interest in the property to the plaintiffs. As regards the use of the words "beneficial owner" in the assignments, it is submitted that the consequences resulting from their use by virtue of the Conveyancing Act, 1881, only follow where the document is in fact a conveyance or mortgage of property. [They also referred to *Ex parte Nichols*. (1)]

*Ward Coldridge, K.C.*, and *F. Luxmoore*, for the defendant Arnold. Under the deed of 1908 the defendant Arnold purchased from Lind as vendor for a sum of 450*l.* the right to receive a reversionary sum of money. The transaction was not one of loan, but of the purchase of a charge of 1500*l.* on a reversionary interest supported by an irrevocable power of attorney. This irrevocable right to recover from the estate of Lind's mother was not destroyed by the bankruptcy. The assignment was for valuable consideration and passed an equitable interest in the reversionary property, and was not merely equivalent to a covenant to assign. If an assignment is one of such definite property that a Court of Equity would enforce specific performance of it an immediate present interest is thereby transferred: *Holroyd v. Marshall* (2); *In re Clarke* (3); *Tailby v. Official Receiver*. (4) *Belding v. Read* (5) was overruled by *Tailby v. Official Receiver*. (4)

The Courts have distinguished between an assignment and a power to seize: *Reeve v. Whitmore*. (6) In *Thompson v. Cohen* (7) there was no express assignment of the goods to be afterwards acquired nor any agreement to assign them, but merely a power to enter and seize them. But a power to enter and seize does not create any interest in the property itself, and *Thompson v. Cohen* (7) is therefore distinguishable from this case. The same observation applies to *Cole v. Kernot*. (8) *Collyer v. Isaacs* (9) is also distinguishable. That was a bill of sale case, and the assignment was of existing chattels coupled

(1) (1883) 22 Ch. D. 782.

(2) (1862) 10 H. L. C. 191, 210.

(3) (1887) 36 Ch. D. 348.

(4) (1888) 13 App. Cas. 523, 543.

(5) (1865) 3 H. & C. 955.

(6) (1863) 33 L. J. (Ch.) 63.

(7) L. R. 7 Q. B. 527.

(8) L. R. 7 Q. B. 534, n.

(9) 19 Ch. D. 342.

with words amounting to a mere licence to seize after-acquired property, and it was held that it did not operate as an assignment of the latter. There was no obligation there on the grantor of the bill to bring anything on to the premises. There is nothing in that case which compels the Court to hold that the equitable interest of the defendant Arnold was destroyed by the bankruptcy.

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The present case is distinguishable from the cases relating to chattels. Here the contract was completely performed by both parties before the bankruptcy. The defendant Arnold had paid the money and Lind had assigned the property. There remained nothing more to be done. Lind was under no liability to do anything further on his mother's death. He had done all he could do to divest himself of this interest and had been paid for so doing.

Further, any contract the proper remedy for the breach of which would be specific performance is not destroyed by the bankruptcy: *Hardy v. Fothergill* (1); see also *Robinson v. Ommanney*. (2) The argument for the defendant Arnold cannot be better put than it was put by Cotton L.J. in *In re Clarke*. (3)

If the defendant Arnold had to rely on his right to specific performance instead of his higher right of equitable assignment the case would be covered by *In re Reis*. (4)

[WARRINGTON J. If you are right on your first proposition the assignment by the defendant Arnold under his power of attorney would be immaterial.]

That is so.

[They also referred to the Conveyancing Act, 1882, s. 8, sub-s. 1.]

*Tomlin, K.C.*, and *Attwater*, for the defendants the Norwich Union. There are two indisputable propositions: (1.) where the debt is secured the fact that the debt is destroyed by the intervention of bankruptcy does not destroy the security. A secured creditor may stand outside the bankruptcy. (2.) An assignment of or a covenant to assign future property is not an obligation or engagement which is necessarily put an end to by the

(1) (1888) 13 App. Cas. 351, 360.

(3) 36 Ch. D. 352.

(2) (1883) 23 Ch. D. 285.

(4) [1904] 2 K. B. 769.



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bankruptcy : *In re Reis*. (1) The problem in this case is to ascertain why in the particular case of *Collyer v. Isaacs* (2) what was said to be a covenant as to after-acquired property did disappear. The case was one of a bill of sale, and the assignment was not one which would in equity pass the after-acquired chattels. The bill of sale did not confer a right of property in the chattels, but gave a mere licence to the grantee, in certain events, to enter and seize them. On that ground the case is distinguishable from the present. Specific performance of contracts relating to chattels will not be decreed by the Court unless the chattels themselves possess some special characteristics.

In the Norwich Union's mortgage the mortgagor assigns as "beneficial owner," and the mortgagees therefore get the benefit of the covenants implied by the Conveyancing Act, 1881. Those covenants are incident to the security and not merely to the debt, and are therefore not affected by the bankruptcy of the mortgagor.

[They also referred to *In re New Oriental Bank Corporation* (No. 2). (3)]

*F. Whinney*, for the defendant G. M. Lind, the administrator of Florence Lind, took no part in the argument.

*Hughes, K.C.*, in reply.

*Cur. adv. vult.*

Feb. 23. WARRINGTON J. read the following judgment: The question in this special case is whether certain dealings by one Hugh James Lawrence Lind, whom I will hereinafter call Hugh Lind, with his expectant share as one of the next of kin of a living person are rendered inoperative by his bankruptcy and the order of discharge therein happening while the person in question was still living. [His Lordship stated the facts as above set out, and referring to the deed of May 20, 1908, said that it was contended that that deed did not create merely a security for a debt, but was a reversionary assignment as on a sale of a portion of the expectant share, but in his Lordship's opinion that contention was not well founded. The assignment was by way of

(1) [1904] 2 K. B. 769.

(2) 19 Ch. D. 342.

(3) [1895] 1 Ch. 753.

security for the debt created by the covenant to pay the 1500*l.* and other moneys. He continued:] The plaintiffs, whose assignment is subsequent to the date of the order of discharge, claim to be entitled to the fund on the ground that the assignments in favour of the society and of Arnold were in law nothing but contracts to assign, creating debts provable in bankruptcy, and that the effect of the bankruptcy and the order of discharge therein has been to release Lind from all liability under such contracts and accordingly to render the assignments wholly ineffectual. They rely on the following provisions of the Bankruptcy Act, 1883. By s. 30 it is provided that with certain exceptions not material for this purpose the order of discharge shall release the bankrupt from all debts provable in bankruptcy, and by s. 37, sub-s. 3, “all debts and liabilities” (with immaterial exceptions) “to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy.” Then by sub-s. 8: “‘Liability’ shall for the purposes of this Act include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money’s worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor, and generally it shall include any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of money, or money’s worth, whether the payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or as matter of opinion.”

The society and Arnold contend that the assignment of an expectancy does not merely create the liability to assign the subject thereof so soon as the expectancy has been realized, but on this event happening it operates in equity without any further act on the part of the assignor or assignee as an actual

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assignment in the same manner as if the assignor had been actually possessed of it at the date of the assignment, and that if the assignment is by way of security for a debt it is no more affected by the bankruptcy and the order of discharge and the statutory release of the debt than a security on existing property of a debtor would be.

It is an important fact in the present case that the assignments to the society and to the defendant Arnold are not assignments in general terms of property to be afterwards acquired by the assignor, but a definite item of property to which he expects to become entitled, so that no question as to vagueness or uncertainty arises.

What then is the true effect of an assignment of a definite expectancy such as the presumptive share of one of the next of kin of a living person in the distribution of his estate? The principles applicable to the transfer of property not in existence at the time are those stated by Lord Westbury in *Holroyd v. Marshall*. (1) He says: "It is quite true that a deed which professes to convey property which is not in existence at the time is as a conveyance void at law, simply because there is nothing to convey. So in equity a contract which engages to transfer property, which is not in existence, cannot operate as an immediate alienation merely because there is nothing to transfer. But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired."

In addressing the House of Lords in *Tailby v. Official Receiver* (2), Lord Macnaghten says: "It has long been settled that future property, possibilities and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value, in

(1) 10 H. L. C. 210.

(2) 13 App. Cas. 543, 549.

terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified." Again he says: "A contract for value for an equitable charge is as good an equitable charge as can be." Lord Watson in the same case says(1): "The rule of equity which applies to the assignment of future choses in action"—the subject of that case—"is, as I understand it, a very simple one. Choses in action do not come within the scope of the Bills of Sale Acts, and though not yet existing, may nevertheless be the subject of present assignment. As soon as they come into existence, assignees who have given valuable consideration will, if the new chose in action is in the disposal of their assignor, take precisely the same right and interest as if it had actually belonged to him, or had been within his disposition and control at the time when the assignment was made." I lay particular stress upon the concluding passage.

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In *In re Clarke* (2) a mortgagor assigned "all moneys of or to which he then was or might during the security become entitled, under any settlement, will, or other document, either in his own right, or as the devisee, legatee, or next of kin of any person." He then filed a petition for liquidation under which a trustee was appointed and subsequently became entitled to a share of personal estate under the will of a deceased person. It was held by the Court of Appeal that the claim of the mortgagor to this share prevailed over that of the trustee in the liquidation.

There can, I think, be no question, therefore, that if the bankruptcy were still subsisting the society and the defendant Arnold would, as against the trustee, be held entitled to be treated as mortgagees of the property in question.

Has the security which they would otherwise have had been destroyed by the statutory release of the debtor from his liabilities occurring as it did prior to the realization of his expectancy?

That in such a case as the present where the subject-matter

(1) 13 App. Cas. 533.

(2) 36 Ch. D. 348.



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of the assignment is a definite item of property expected to be afterwards acquired, such assignment, if made for valuable consideration given at the time of execution, will in general take effect notwithstanding the subsequent bankruptcy and discharge of the assignor, is, I think, established by the case of *In re Reis*. (1) In that case Reis in 1879 by his marriage settlement covenanted to settle his after-acquired property with certain exceptions. In 1880 he was adjudged a bankrupt and obtained his discharge in 1882. In 1903 on the eve of a second bankruptcy he, by way of further assurance, transferred a house and furniture to the trustees of his settlement. It was held by the Court of Appeal that the liability under the covenant in the marriage settlement was not a provable debt and not released by the bankruptcy in 1880 and the subsequent discharge, and that the transfer of the house and furniture being in the nature of a further assurance was valid against the trustee in the subsequent bankruptcy. Cozens-Hardy L.J. made the following remarks: "As to the third point, that the covenant was released by the bankruptcy of the husband in 1880, with the result that the deeds of June, 1903, were voluntary, and therefore void under s. 47, sub-s. 1, I think this objection cannot prevail. When once it has been decided that the covenant is one of which specific performance can be obtained, it follows that the right to specific performance is not barred by the bankruptcy. The covenant is not ancillary to a debt which was released by the bankruptcy; and there is no evidence of any breach of the covenant before the bankruptcy was closed." Stirling L.J. said: "In my judgment the covenant in the present case is one in which specific performance is the appropriate remedy, and it ought not to be held barred by the order of discharge in the first bankruptcy." Cozens-Hardy L.J. it will be observed (bearing in mind, no doubt, the case of *Collyer v. Isaacs* (2) which I shall deal with presently) points out that in the case before him the covenant was not ancillary to a debt. In this case the assignment—the equivalent of the covenant to settle in *In re Reis* (1)—was made as security for a debt. Does this introduce any real distinction between this

(1) [1904] 2 K. B. 769, 777, 781.

(2) 19 Ch. D. 342.

case and *In re Reis*? (1) If it be, and on the authorities I have cited I think it is, correct to say that an assignment of a definite property to be afterwards acquired creates not merely a personal liability to transfer the property when the time comes but an actual interest in the assignee as if the assignor had been possessed of the property at the date of the assignment (whether by the application of the doctrines relating to specific performance or of the maxim that equity treats as done that which ought to be done, it matters not), the title of the assignee cannot, in my opinion, depend on whether the consideration for the assignment was the loan of money or any other valuable consideration. In either case the remedy of the assignee is not merely a personal remedy in damages against the assignor, but a right in rem against the subject of the assignment, and if the assignee be a mortgagee his right to his security as distinct from his personal remedy against the mortgagor would, in my opinion, be unaffected by the bankruptcy and the discharge thereunder.

But it is said I am precluded from giving effect to the opinion I have expressed by the decision of the Court of Appeal in *Collyer v. Isaacs* (2), and that case therefore requires careful examination in order to ascertain whether the decision really governs the present case. The head-note is as follows: "A debtor by bill of sale assigned for value to a creditor certain specified chattels at his place of business, 'and all other chattels which might be or at any time thereafter be brought thereon in addition to or in substitution thereof.' The debtor became bankrupt, and after his order of discharge brought other chattels upon the premises. The creditor did not prove for his debt in the bankruptcy:—*Held* (reversing the decision of Hall, V.-C.), that the assignment of the after-acquired chattels, although absolute in form, amounted merely to a contract to assign for the breach of which the assignor incurred a liability provable in his bankruptcy, and from which he was released by the order of discharge; that consequently the goods brought on the premises after the order of discharge could not be seized by the creditor under his bill of sale." It will be observed that the assignment in that

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case was not as in the present an assignment of a specific item of property to be afterwards acquired, but of all goods and chattels on the business premises of the mortgagor or which might thereafter be brought thereon, and the deed contained power to seize the goods then upon the premises on the happening of certain events. The mortgagor was a trader, and to treat the assignment as conferring on the mortgagees the right to every chattel from time to time on the premises would render it impossible for the mortgagor to carry on the business. I think the assignment in this case was much in the nature of a debenture of a company, namely, a floating security to be crystallized by seizure under the power of sale. If this be so then the right of the mortgagee would be a merely contractual right requiring either an actual transfer of existing chattels by the mortgagor or the seizure by the mortgagee to convert it into a right to the things themselves. In giving judgment Jessel M.R. said (1): "The creditor had a mortgage security on existing chattels and also the benefit of what was in form an assignment of non-existing chattels which might be afterwards brought on to the premises. That assignment, in fact, constituted only a contract to give him the after-acquired chattels. A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment. If a person contract for value, e.g., in his marriage settlement, to settle all such real estate as his father shall leave him by will, or purports actually to convey by the deed all such real estate, the effect is the same. It is a contract for value which will bind the property if the father leaves any property to his son. When this is clearly understood, it follows that until the property comes into existence the contract remains only a contract by which the party entering into it will be bound, and when the property comes into existence it is a contract for the breach of which he will incur liability. That being so, when the party who contracts becomes bankrupt

the liability in respect of that contract is a liability provable in the bankruptcy, but by the 49th section"—that is of the Act of 1869—"he is released, with certain exceptions, from every liability provable, and so, upon obtaining his discharge, the bankrupt will say, 'I am discharged from the liability; it was only a liability to which I was subject at the time of bankruptcy, and from that the discharge I have obtained releases me.' Without saying that that would apply to the case of a marriage settlement containing a covenant to settle after-acquired property, when you have a debt, and a covenant to secure that debt in a particular way, it would be a strange result if you could bar the debt and not what I may call the ancillary covenant. Suppose a man were to covenant that all his after-acquired property should be liable to a charge, the result might be that he never could get free or obtain a fresh start in life." Then after referring to s. 12 of the Bankruptcy Act, 1869, which is not material in the present case, he proceeds: "Then we come to the 31st section, which makes all liabilities debts provable in bankruptcy." And for all material purposes that section is the same as s. 37 of the Act of 1883, to which I have already referred. "That section relieves him so far because the discharge releases him under sect. 49 with certain exceptions, from all debts provable under the bankruptcy. Without saying that this applies to a definite contract for the settlement of a specific property non-existing at the time—for I wish to guard myself against being supposed to be now deciding that point—I am of opinion that where there is a general liability in respect of a debt which is barred by a discharge in bankruptcy, and a liability in respect of a covenant to secure that debt, the bankrupt then is not only discharged from the principal liability to pay the debt, but also from the ancillary liability to give security for it on his after-acquired chattels, and thus the future property of the bankrupt is absolutely discharged, and therefore the after-acquired chattels are not subject to seizure by the creditor." Baggallay L.J. made the following remarks (1): "At the time when the bankrupt committed the act of bankruptcy, and when he obtained his discharge, the only

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security the creditor held was upon the goods and chattels which were then on the premises. As far as regards the after-acquired chattels, whether the security was in form, as in *Cole v. Kernot* (1), an actual assignment, or, as in *Thompson v. Cohen* (2), merely a covenant or undertaking to assign, the security was only in the nature of a liability; and the 31st section has directly enacted that all liabilities are debts provable in the bankruptcy. When you have established a debt provable in bankruptcy, we come to the 49th section, which says that, with certain exceptions, not applicable to the present case, an order of discharge shall release a bankrupt from all debts provable under the bankruptcy. Consequently any liability on the part of the bankrupt in respect of an obligation to bring after-acquired chattels into an existing security, was a liability which, as being a debt provable, is got rid of by the order of discharge." Both these learned judges assumed as the basis of their judgments that in the case before them the mortgagee had at the time of the bankruptcy no actual security existing over chattels then in existence, and that as regards future chattels he was entitled to nothing more than the benefit of a personal obligation on the part of the mortgagor to transfer them to him, and I have above suggested a reason appearing on the face of the deed itself for such a view.

In the present case I am of opinion that the mortgagees were at the time of the bankruptcy entitled not merely to the benefit of a personal obligation on the part of the mortgagor resulting in a claim for damages, but to a prospective interest in the distributive share in question taking effect automatically on the death of Florence Lind, and, therefore, that the decision in *Collyer v. Isaacs* (3) does not govern the present case. In the view I take it is unnecessary to consider the effect of the assignment of April 22, 1914. It added nothing to the force of the deed of 1908.

I must answer the first question in the affirmative. In answer to the second question I propose to declare that the indenture of May 20, 1908, is a valid and effectual mortgage or charge of

(1) L. R. 7 Q. B. 534, n.

(2) L. R. 7 Q. B. 527.

(3) 19 Ch. D. 342.

the share and interest of Hugh Lind as one of the next of kin of Florence Lind.

In answer to questions 3 and 4 I propose to declare that the society and Arnold are both entitled to rank in priority to the plaintiffs. I understand it is unnecessary to determine the priorities as between the society and Arnold.

The defendant George McClintock Lind must have his costs as between solicitor and client out of the fund. The society and Arnold will, I suppose, add theirs to their respective securities and there will be no order as to those of the plaintiffs who are in effect in the position of mortgagors. I understand the fund is sufficient to pay the society and Arnold in full and leave a surplus for the plaintiffs.

Solicitors: *Nye, Moreton & Clowes; Hartcup & Davis; Hicks, Arnold & Mozley; Walker, Martineau & Co.*

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*Company — Dividends — Purchase of Undertaking of Vendor Company — Guarantee Fund to secure Payment of Dividends — Agreement that Vendor Company should provide Fund out of Purchase-money — Deposit of Fund in Names of Trustees — Return of Capital to Shareholders — Winding up of Purchasing Company — Rights of Creditors.*

By an agreement dated February 10, 1913, the R. company agreed to purchase the business and undertaking of the M. company. By the purchase agreement the vendor company guaranteed that the net profits of the purchasing company in respect of the business should amount to not less than 10 per cent. per annum on the paid-up capital of the shares subscribed for by the public in connection with a proposed issue which the purchasing company intended to make, and the vendor company undertook that if there should not be during the first year of the purchasing company's trading sufficient to pay a dividend of 10 per cent. per annum on such shares they would pay to the purchasing company such sum as together with the profits received by the company would make the sum available for distribution in dividend sufficient to

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pay 10 per cent. per annum on the subscribed shares. The vendor company also agreed to pay a sum equal to 10 per cent. in cash on the total amount of the shares subscribed as aforesaid, such sum to be paid out of the purchase-money into a bank in the joint names of the vendor company and two trustees for the purchasing company, and should be held by them in trust to secure the performance of the guarantee aforesaid and subject thereto for the vendor company absolutely. In June, 1913, at a meeting of the directors of the purchasing company it was resolved that a cheque should be drawn for the sum of 384*l.* 6*s.*, being the amount of 10 per cent. on the shares subscribed for by the public, such sum to be deemed as a payment on account of the purchase-money under the agreement with the vendor company, and that D. and M. (two of the directors of the purchasing company) should be the trustees of the deposit. Shortly afterwards the 384*l.* 6*s.* was paid by the purchasing company into a bank to an account in the joint names of D. and M. In February, 1914, the purchasing company was ordered to be wound up. On an application by its liquidator for the determination of the question whether the sum deposited formed part of the assets of the purchasing company or whether the contributories of such company had any interest in such sum:—

*Held*, that, there being no liability under the agreement on the part of the vendor company to make the deposit except out of the purchase-money, the money was the property of the purchasing company, formed part of its general assets, and was divisible amongst its creditors.

*In re South Llanharra Colliery Co.* (1879) 12 Ch. D. 503 distinguished.

#### ADJOURNED SUMMONS.

This was an originating summons by the liquidator in the name of the plaintiff company (hereinafter called the purchasing company) for the determination of the question whether, on the true construction of clause 4 of an agreement dated February 10, 1913, and made between Menell et Cie., Limited (hereinafter called the vendor company), of the one part and a trustee on behalf of the purchasing company of the other part, and in the events which had happened, a sum of 384*l.* 6*s.* paid by the purchasing company into the Kilburn branch of the London and South Western Bank, Limited, to an account in the joint names of the defendants Herman Diamant and George Menell formed part of the general assets of such company and ought to be handed over to the liquidator of such company, or whether the contributories of such company had any and what interest in such sum.

The facts are fully stated in the judgment of Warrington J. and were shortly as follows.

The purchasing company was incorporated on February 13, 1913. WARRINGTON J.

The agreement in question was an agreement for the purchase by the purchasing company of the business and undertaking of the vendor company. The material clauses were the following: Clause 3: "The vendor company hereby guarantee that the net profits of the purchasing company in respect of the business hereby agreed to be sold shall amount to not less than ten per centum per annum upon the paid-up capital of the shares subscribed for by the public in connection with a proposed issue which it is the intention of the purchasing company to make, and the vendor company undertake that if there shall not be, during the first year of the purchasing company's trading, sufficient to pay a dividend of ten per centum per annum upon such shares, they will pay to the purchasing company such sum as together with the amount of the profits received by the company will make the sum available for distribution by way of dividend sufficient to pay ten per centum upon the subscribed shares." Clause 4: "The vendor company undertake and agree to pay a sum equal to ten per centum in cash upon the total amount of the shares subscribed as aforesaid, such sum to be paid out of the purchase money payable under this agreement into the joint names of the vendor company and the two trustees for the purchasing company, and shall be held by them in trust to secure the performance of the guarantee contained in the preceding clause hereof and subject thereto for the vendor company absolutely."

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On June 25, 1913, a meeting of the directors of the purchasing company was held, at which it was resolved that a cheque should be drawn for the sum of 384*l.* 6*s.*, being the amount of 10 per cent. upon the shares subscribed for by the public, such sum to be deemed as a payment on account of the purchase-money under the agreement with the vendor company, and that Dr. Diamant and Mr. Menell (two of the directors of the purchasing company) should be trustees of the deposit.

On February 24, 1914, an order was made on a creditors' petition to wind up the purchasing company.

The purchasing company never paid any dividend or issued



WARRINGTON J. any balance-sheet or report, and in fact never made any profits.

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The vendor company went into liquidation pursuant to a special resolution duly passed and confirmed on March 12 and 27, 1913, and liquidators were appointed.

*J. E. Harman*, for the liquidator of the purchasing company, stated the facts and submitted that the deposit of 384*l.* 6*s.* formed part of the general assets of the company and was divisible amongst its creditors.

[He was stopped.]

*W. Higgins*, for the defendant Tew, representing the contributories of the purchasing company. The question as to whom this deposit belongs depends upon contract.

[WARRINGTON J. What contract is there with the shareholders of the purchasing company?]

The vendor company guaranteed that the shareholders of the purchasing company should receive a dividend of 10 per cent. on their shares. The deposit is now in the hands of the trustees, who hold it on trust for the vendor company subject to the performance of the guarantee. The present case is, it is submitted, covered by *In re South Llanharraan Colliery Co.* (1), where the facts were substantially the same as those in this case. Here the shareholders paid cash for their shares on the representation in the prospectus that they would be guaranteed a dividend of 10 per cent. on them. No creditor of the company has therefore any ground for complaint that this sum of 384*l.* 6*s.* was allocated to the shareholders.

*J. E. Harman.* *In re South Llanharraan Colliery Co.* (1) is distinguishable from this case on the ground stated by Cotton L.J., namely, that "if there is any vice in the transaction, if it was a device by which a portion of the purchase-money was to be returned to the shareholders, it was a void contract." Here the money deposited never belonged to the vendor company. It never ceased to be the property of the purchasing company and was paid out of the money subscribed by the shareholders for their shares. *Trevor v. Whitworth* (2) is conclusive on the point. This is a

(1) 12 Ch. D. 503, 509.

(2) (1887) 12 App. Cas. 409.

case of the purchase of shares at a discount. The money for the purchase of the vendor company's business was increased in order to provide the money for the guarantee. (See Buckley on Companies, 9th ed. p. 659.) The present case falls within *In re Stuart's Trusts* (1) and *In re Gelly Deg Colliery Co.* (2), where under similar circumstances the guarantee fund was held to be payable to the liquidator of the company and not to the contributories.

On the facts it is submitted that the arrangement was a device to evade the Companies Acts. Capital of a company cannot be returned to the shareholders except under an order of the Court. A company cannot enter into a contract with its shareholders so as to defeat its creditors. The deposit here was not an independent fund provided by an outsider. It was money which by the terms of the contract was to be provided out of the purchase-money and which never really became the money of the vendor company. In effect the shareholders of the purchasing company were getting back part of the money subscribed by them for their shares and the arrangement was in reality a reduction of the purchase-money. The money on deposit therefore forms part of the general assets of the purchasing company.

*E. M. Winterbotham*, for the liquidators of the vendor company, supported the argument on behalf of the purchasing company. The vendor company is the largest creditor of the purchasing company and their interest is therefore substantially the same as that of the purchasing company. There might be a question whether on the construction of the guarantee there is anything due upon it, but that point is not pressed. If there was really a bona fide sale for a fixed price and the vendor agreed that over and above that he would guarantee a dividend of a certain amount to the shareholders of the purchasing company so that the purchase and the guarantee could be treated as, in effect, separate matters, the arrangement would be unobjectionable in point of law. The guarantee, however, must be found outside the purchase agreement. Here there was a definite agreement that the guarantee should be paid out of the purchase-money.

(1) (1876) 4 Ch. D. 213.

(2) (1878) 38 L. T. 440.

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*J. Oddy*, for the trustees of the deposit.

*W. Higgins* in reply. There is no evidence that the amount of the purchase-money was increased in order to provide for the guarantee. There is no case which decides that if a guarantee fund is to be provided for out of the purchase-money such an arrangement will be an evasion of the Companies Acts. Here the purchase-money ceased to be purchase-money when it was paid. As soon as the 384*l.* 6*s.* reached the hands of the trustees it ceased to be capital or assets of the purchasing company and became part of the purchase-money belonging to the vendor company subject to the right of the shareholders of the purchasing company under the guarantee. It is impossible, therefore, to conclude that this was a payment out of the capital of the purchasing company. It is submitted, therefore, that the 384*l.* 6*s.* formed part of a fund which belonged to the vendor company.

WARRINGTON J. The question in this case is, Who is entitled to the sum of 384*l.* 6*s.* which has been placed to the credit of the first two named defendants Herman Diamant and George Menell? It is claimed first by the plaintiff company, which I will refer to as the purchasing company, through their liquidator as part of their general assets. It is also claimed by their contributories, represented here by the defendant Tew, as moneys payable to them individually. The money is in fact a sum provided for the purpose of satisfying a guarantee given by Menell et Cie., Limited, which I will refer to as the vendor company, upon the sale of a certain property to the purchasing company. The guarantee was contained in an agreement dated February 10, 1913, made between the vendor company and a trustee on behalf of the purchasing company and afterwards adopted by the purchasing company. It was an agreement for the sale by the vendor company of certain businesses and assets belonging thereto. The consideration for the sale was to be the sum of 11,500*l.* to be paid or satisfied as to 3000*l.* in cash, as to 3500*l.* in cash or shares at the option of the directors of the purchasing company, and as to the balance of 5000*l.* by the allotment to the vendor company or their nominees of 10,000

shares of 10s. each fully paid, being part of the capital of the purchasing company. By a resolution of the directors of the purchasing company passed after incorporation it was resolved that the consideration should be satisfied by the payment of 6500*l.* in cash subject to certain modifications in certain events which it is immaterial to mention. The clauses of the agreement which give rise to the present question are clauses 3 and 4, which are in the following terms: [His Lordship read the clauses and continued:] The purchasing company was incorporated on February 13, 1913, and the agreement was shortly afterwards duly adopted. On February 14, 1913, a prospectus was issued inviting subscriptions from the public for 30,000 ordinary shares of 10s. each, in which it was stated that a minimum dividend of 10 per cent. would be guaranteed on the first year's trading. Amongst the contracts there mentioned was the agreement of February 10, 1913, and it was stated that the vendor company thereby guaranteed the payment of a minimum dividend of 10 per cent. for the first year of the company's trading. There was a considerable number of applications—between 7000 and 8000—for shares by the public. On June 25, 1913, at a meeting of the directors of the purchasing company the following resolutions were passed: "It was resolved that a cheque be drawn for the sum of 384*l.* 6s. being the amount of 10 per cent. upon the shares subscribed for by the public, such sum to be deemed as a payment on account of the purchase-money under the agreement with Menell et Cie.," and "It was resolved that Dr. Diamant and Mr. Menell be the trustees for this deposit." The purchasing company were shortly afterwards ordered to be wound up, and the present application is made by the liquidator in their name.

The question is to whom is this sum of 384*l.* 6s. payable. It has been suggested on the part of the vendor company that it is really payable to them; but that contention was not pressed, and in my opinion it could not have been successfully pressed. The sum must be either the property of the purchasing company in the sense that it is part of their general assets or the property of their individual contributories.

In the first place, if the matter had rested on clause 3 of the

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agreement of February 10 alone I think I should have come to the same conclusion on the construction of that clause as the Court of Appeal did on a similar clause in *In re South Llanharan Colliery Co.* (1), namely, that the true intention of the parties to the agreement was to provide a fund that should be divisible among the shareholders and not to form part of the general assets of the company. As James L.J. in that case said (2), "The real meaning of the contracting parties was that the contract was to be for the benefit of the shareholders, not of the company. The payment to the company by Jegon was mere machinery—the company was only the hand by which the money was to be paid to the shareholders; it was to be paid to the company as into an office, that it might be distributed to the shareholders. That was what the parties really meant by the contract, and there was nothing contrary to morality or honesty in carrying it into effect." In the present case I think on the construction of clause 3 of the agreement of February 10, 1913 by itself that that would be so, especially having regard to the last words of the clause which describe what has to be paid in these terms: "such sum as together with the amount of profits received by the company will make the sum available for distribution by way of dividend sufficient to pay ten per centum upon the subscribed shares." It is obvious that that contemplates that the sum shall be distributed by way of dividend. So far I think the contributories are right.

If the case had stood there this would have been a case, just as it was in *In re South Llanharan Colliery Co.* (1), of a mere personal obligation on the part of the vendor company to make up the profits to a certain amount. In the absence of any evidence that the stipulation was merely a device by which some part of the purchase-money was to be appropriated to the payment of a dividend to their own shareholders there would have been no objection from the point of view of the Companies Acts, and nothing to prevent the Court giving effect to the true construction of the agreement. The only question would have been what the agreement meant. But it is said in the present case that this is not so—that this is not a case of a mere personal obliga-

(1) 12 Ch. D. 503.

(2) 12 Ch. D. 507.

tion binding on the vendor company whatever happens, but that it is a case in which a part of the purchase-money itself is allocated and set apart for the satisfaction of this guarantee, and that the result of that is that it is the purchasing company and not the vendor company which provides the fund which is to be divided among the shareholders.

In *In re South Llanharra Colliery Co.* (1) Cotton L.J. expressly guards himself against being supposed in a case such as the one now before me to decide in favour of the shareholders. He says (2) that "if there is any vice in the transaction, if it was a device by which a portion of the purchase-money was to be returned to the shareholders, it was a void contract. But is there any ground for saying that? It was not a portion of the purchase-money which was to be set apart and returned to the shareholders, but the vendor, having received the whole of the purchase-money, made a personal contract by which it was intended to secure to the shareholders interest on their capital at 5l. per cent. during two years." And when one looks at the facts of that case one sees how strong they were in support of the bona fides of the transaction. The consideration there for the sale was to be 35,000l. payable as to 10,000l. in cash and as to the remaining 25,000l. by the allotment and issue to the vendor, T. Jegon, or his nominees of 2500 fully paid-up shares in the capital of the company and the payment of certain royalties. Then the guarantee contract was to this effect: Jegon agreed with a trustee, on behalf of the intended company, to pay to the company during two years from the date of its incorporation such a sum as together with the net profits of the company should be equal to interest at the rate of 5 per cent. per annum on the capital for the time being paid up. Then by the next clause it was provided that all moneys paid by Jegon by virtue of the last preceding clause should be repaid to him out of the surplus profits which might in any subsequent year remain after payment in each such subsequent year of a dividend of 10 per cent. per annum for that year on the capital for the time being paid up. Therefore there was nothing in that agreement which amounted to anything approaching a stipulation that a portion

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of the purchase-money was to be set apart for return to the shareholders. On the facts it does not even stop there. Jegon invested the whole of the cash price in fully paid up shares of the company, and when the time came for fulfilling his obligations under the guarantee he paid to the directors of the company out of his own moneys the money to be distributed amongst the shareholders, of whom he was one, and after the winding-up he paid a further sum due under the guarantee direct to the contributories. This latter sum was claimed by the liquidator. The Court of Appeal negatived that claim and held that the transaction was a perfectly honest one, and that no one could take the money so paid from the contributories.

Does that decision apply to the present case? It seems to me that I have to decide the very case to which Cotton L.J. referred as not being covered by the decision of the Court of Appeal in the case before them. The obligation entered into by the vendor company in clause 3, is followed by the provision in clause 4 that such sum is to be paid out of the purchase-money payable under the agreement into a bank in the joint names of the vendor company and two trustees for the purchasing company and is to be held by them in trust to secure the performance of the guarantee contained in the preceding clause and subject thereto for the vendor company absolutely. It seems to me that under this agreement what really happened was that the vendor and purchasing companies between them agreed to set apart and appropriate a portion of the purchase-money for the satisfaction of the guarantee by the making of this deposit. There was no liability on the part of the vendor company to make this deposit except out of the purchase money. The money was and never ceased to be in reality the money of the purchasing company. It was paid by their cheque. It was in fact paid out of the money subscribed by the shareholders for their shares. The real meaning of the claim by the shareholders is that they claim to be paid out of the money subscribed the 10 per cent.—namely, 2s. in every 1l. subscribed by them—on the pretence that it is payable under the guarantee of the vendor company. It seems to me that this is an attempt by the contributories to get back a part of that

which is or has been part of the moneys of the purchasing company and which is now divisible amongst its creditors.

I think that there must be an order that the sum in question forms part of the general assets of the purchasing company. The costs of all parties as between solicitor and client will be paid out of the fund.

Solicitors: *Walls, Stallard & Newton; Heywood & Ram; W. T. Hick.*

W. I. C.

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*Administration — Tenant for Life — Remainderman — Payment of Debts, Legacies, and Duties — Income of Residue till Payment — Lapse of more than One Year from Testator's Death — Rate of Interest — Interest on Estate Duty — Adjustment of Accounts.*

Testator gave his real and personal estate not thereby otherwise disposed of, therein called his residuary estate, to his trustees in trust to sell, and out of the proceeds pay or provide for debts, funeral and testamentary expenses, legacies and annuities, and duties, and to divide the residue into nine equal shares, and to invest and pay the income of one ninth share to each of his three daughters during her life with remainders over, and (by clause 15) the testator empowered his trustees to postpone the sale and conversion of all or any part of his real and personal estate as long as they should think proper, and directed that the income from his estate however invested should after his death be treated as income, and no part thereof should be added to capital. Testator died in 1909, leaving an estate of great value. The payments required to be made out of his residuary estate in respect of debts, legacies, duties, &c., were not concluded till the expiration of five years from the date of the testator's death. The average rate of interest earned by the estate in each of these five years varied considerably. On an originating summons raising the question how the accounts ought to be adjusted between the tenants for life and the remaindermen of the daughters' settled shares of residue:—

*Held*, that the direction contained in clause 15 of the will did not displace the rule in *Allhusen v. Whittell* (1867) L. R. 4 Eq. 295 and *In re McEuen* [1913] 2 Ch. 704.

*Held*, also, that the true principle was to deprive the tenant for life of



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the income of such a sum as together with interest thereon from the date of the testator's death down to the date of payment was sufficient to satisfy the liabilities.

*Held*, also, that the principle was not limited to the payments made during the first year from the testator's death, but applied equally to payments made during the subsequent years.

*Held*, also, that the average rate of interest earned by the estate in each year ought to be adopted for the purpose of this calculation.

*Held*, also, that as regards estate duty the total amount paid for duty and interest thereon ought to be treated as the debt or liability to be paid or discharged.

#### ADJOURNED SUMMONS.

Sir Frederick Wills by his will, dated November 6, 1908, after bequeathing certain pecuniary legacies and life annuities free of duty, and after directing the appropriation of a sufficient part of his residuary estate to answer the annuities out of the income thereof, and after directing the appropriation of a fund sufficient to produce the income of 10,000*l.* per annum (called the Baronetcy Fund), and after making certain specific devises and bequests, (by clause 9) devised and bequeathed to his trustees all his real and personal estate not otherwise disposed of by his will (therein called his residuary estate) upon trust to sell and convert the same into money and out of the proceeds pay or provide for his debts, funeral and testamentary expenses, and the legacies and annuities bequeathed by his will and all the duties directed to be paid as aforesaid, and then divide the residue thereof into nine equal shares and to pay or transfer three ninth shares to his son Sir Gilbert Wills absolutely and three other ninth shares to his son F. N. H. Wills absolutely, and as to one other ninth share to invest the same upon trust to pay the income to his daughter Edith Douglas Hamilton for life without power of anticipation and after her death in trust for her appointees by will, and in default of appointment upon certain trusts in favour of her children; and as to one other ninth share upon the like trusts in favour of his daughter Margaret Hamilton-Fellows, her appointees and children; and as to the remaining one ninth share upon trust to divide the same into two moieties and to pay the income of one of such moieties to his daughter Kathleen (now Kathleen Doughty) during her life without power of anticipation, and as to the other of such moieties to accumulate the income

and on her marriage during the remainder of the life of Kathleen SARGANT J. Doughty to hold the income of such last mentioned moiety and the accumulations thereof upon the same trusts in her favour; and (by clause 10) after the death of Kathleen Doughty the testator directed that the first moiety should be held upon trusts therein declared in favour of her children and the second moiety upon the like trusts in favour of her appointees and children as were declared concerning the one ninth share of his daughter Edith Douglas Hamilton; and (by clause 15) the testator empowered his trustees to postpone the sale or conversion of any part of his real and personal estate with powers of managing and leasing in the meantime, and directed that the income from his estate howsoever invested should as from his death be treated as income and no part thereof should be added to capital.

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The testator died on February 13, 1909. His estate was of great value. His daughter Kathleen married Dr. Doughty in September, 1909.

The payments and appropriations in respect of debts, funeral and testamentary expenses, death duties, legacies, and the Baronetcy Fund amounting to the total sum of 739,149*l.* 12*s.* 6*d.* were not completed till the expiration of five years from the testator's death, and this originating summons was taken out by the executors and trustees of the will against the three tenants for life, the infant child of Margaret Hamilton-Fellows, and the infant child of Kathleen Doughty, raising the question how the accounts ought to be adjusted between the tenants for life and the remaindermen of the daughters' settled shares of residue.

The summons was in the following terms:—

“1. Whether so far as respects the shares in the residuary estate of the testator settled by his will for the benefit of his daughters Mrs. Douglas Hamilton and Mrs. Hamilton-Fellows, their appointees and children, the plaintiffs as the executors of such will ought (having regard to the true construction thereof) to be taken to have paid the debts, funeral expenses and duties payable out of the testator's estate and the pecuniary legacies bequeathed by the will and codicil (hereinafter collectively called ‘the liabilities’) out of capital only.

“2. Whether (if the first question is answered in the negative)

SARGANT J. the gross value of the testator's estate not specifically devised and bequeathed at the date of his death ought to be treated as representing two funds, namely, (a) the fund necessary for payment of the liabilities and deductible accordingly, and (b) the net residue fund after making such deduction, and whether (having regard to the true construction of the testator's will) the income of such deductible fund computed from the date of his death down to the respective actual dates when payments were made in discharge or on account of the liabilities ought to be treated as having been added to the net residue fund for the purpose of ascertaining the fund out of which the liabilities ought to be treated as payable.

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“3. Whether (if the first and second questions are answered in the negative) the plaintiffs ought (having regard to the true construction of the testator's will) to be taken to have paid the liabilities on one and which of the following principles, namely, (a) with such portion of the capital as with the income thereof during the first year after the testator's death would at the end of such year amount to the liabilities, or (b) with such portion of the capital as with the income thereof during such first year computed down to but not later than the respective actual dates when payments were made in discharge or on account of the liabilities would amount to such liabilities, or (c) with such portion of the capital as with the income thereof computed down to the respective actual dates (both during the first year after the testator's death and subsequently) of such payments would amount to the liabilities.

“4. Whether (if the second question is answered in the affirmative or if the plaintiffs ought to be taken to have paid the liabilities on any of the principles mentioned in the third question) the income during the period or periods to which the second question or any of the principles mentioned in the third question applies ought to be calculated at the average rate (less tax) earned by the estate during such period or periods or at the rate of 4 per cent. per annum (less tax).

“5. Whether (if the second question is answered in the affirmative or if the plaintiffs ought to be taken to have paid the liabilities on any of the principles mentioned in the third

question) any and what sums ought during the period or periods SARGANT J. aforesaid to be charged against income in respect" (inter alia) of the interest paid on the estate duty payable by the testator's estate.

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"6. Similar questions so far as respects the two respective moieties into which the 'remaining one ninth share' mentioned in paragraph 9 of the said will was thereby directed to be divided."

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Sir William Plender, senior partner in the firm of Deloitte, Plender, Griffiths & Co., chartered accountants, who had audited the accounts of the estate of the testator and prepared the yearly balance sheets, made an affidavit stating that after deducting specific devises and bequests the gross value of the estate at the date of the testator's death was 3,244,599*l.* 12*s.* 8*d.*; that the debts, funeral expenses, death duties, and pecuniary legacies (referred to as the liabilities) amounted to 739,149*l.* 12*s.* 6*d.* (referred to as the "deductible fund"), which being deducted from the gross value left a sum of 2,505,450*l.* 0*s.* 2*d.* as representing the net residue at the date of the testator's death; that the payments and appropriations out of the deductible fund extended over a period of five years from the testator's death, being a sum of 440,485*l.* 16*s.* 1*d.* for the first year, a sum of 118,798*l.* 18*s.* 2*d.* for the second year, a sum of 163,695*l.* 18*s.* 8*d.* for the third year, a sum of 10,800*l.* for the fourth year, and a sum of 5368*l.* 19*s.* 7*d.* for the fifth year; that the payments and appropriations during the last four years related almost entirely to the death duties and the purchase of investments for the Baronetcy Fund; that the average rate of the income earned upon the book value of the estate in each year varied considerably from 4·9 per cent. in the first year to about 9·3 per cent. in the last two years, the increase being due to the falling in of a reversionary interest. Assuming that the first question raised by the summons was answered in the negative, the deponent submitted that the second question ought to be answered in the affirmative. He continued: "The principle there suggested appears to me to offer the most correct and practical method of dealing with the problem. I suggest that the sum of 3,244,599*l.* 12*s.* 8*d.* (representing the gross value of



SARGANT J. the estate) may be treated as representing two separate funds, namely, (a) the deductible fund and (b) the net residue fund after making the deduction, and that no income subsequent to the death should be considered as forming part of the deductible fund. I further submit that (in the absence of a special direction in the will) the income arising from the deductible fund computed from the date of the death to the dates of payment of the liabilities which it was set aside to discharge should be added to the net residue of the estate." The deponent further submitted (1.) that the income on the deductible fund ought to be calculated at the average rate of income earned by the estate and not at a hard and fast rate such as 4 per cent. per annum, and (2.) that it ought to be calculated over the whole period or periods during which payments and appropriations were made from and out of the deductible fund. If the second submission were right the principles (a) and (b) in the second question raised by the summons would be ruled out. The deponent then worked out the figures according to the different answers to questions 2 and 3, and stated the actual sums accounted for to the tenants for life, and stated that, if the first question raised by the summons was answered in the negative, the three tenants for life appeared to have been overpaid whatever answers were given to the other questions.

*A. Grant, K.C.*, and *MacSwinney*, for the executors, stated the questions raised by the summons and referred to *Allhusen v. Whittell* (1) and *In re McEuen* (2) and to an article in the *Law Quarterly Review*, (1914) vol. xxx. p. 481.

*Romer, K.C.*, and *E. Knowles Corrie*, for the tenants for life. First, all these payments are thrown on capital to the exclusion of income by clause 15 of the will. If the rule established by *Allhusen v. Whittell* (1) and *In re McEuen* (2) is to be followed, part of the income of the estate will be applied in payment of liabilities in relief of capital, and the effect of that is to treat income as capital or to add it to capital. A fuller form excluding the rule in *Allhusen v. Whittell* (1) is given in

(1) L. R. 4 Eq. 295.

(2) [1913] 2 Ch. 704.

Key and Elphinstone's Precedents, 10th ed. vol. ii. p. 953. The SARGANT J. rule itself does not appear to be confined to cases where the tenant for life is not entitled to enjoyment in specie: *Holgate v. Jennings* (1), which was one of the authorities on which Wood V.-C. founded himself in *Allhusen v. Whittell*. (2) [They referred to Theobald on Wills, 7th ed. p. 559.]

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[SARGANT J. I am against you on the question of construction.]

In that case we support the principle contained in clause 3 (b) of the summons. *In re McEuen* (3) is in our favour so far as it lays down that the subtraction is to be made at the date of actual payment of the liability if it is made before the expiration of the first year, but is against us so far as it is an authority for continuing the rule after the expiration of the first year. Your Lordship there said (4): "Further, it must not be overlooked that the equitable adjustment dealt with in *Allhusen v. Whittell* (2) is not really more applicable to the first year after the death than to any other subsequent period, in cases where the administration extends beyond the end of the first year. For instance, I notice that in this case at the end of the first year it was anticipated that a large further payment would still have to be made for estate duty. When this payment is made, the total paid for capital and interest will have to be apportioned between capital and income on a basis of a calculation of interest beyond the first year and down to the subsequent date of payment."

If that passage is more than a dictum, at any rate the point was not contested in argument, and the observations are an extension of the rule as stated by Wood V.-C. in *Allhusen v. Whittell* (2), who in terms states the rule as applying to the first year only; and he probably took that period for the operation of the rule upon grounds of convenience. One year from the testator's death is the period during which the executors are entitled to look about them, and at the end of that period matters are supposed to be settled up. If the rule is continued during the subsequent years the executors will never know how much

(1) (1857) 24 Beav. 623.

(2) L. R. 4 Eq. 295.

(3) [1913] 2 Ch. 704.

(4) [1913] 2 Ch. 717.

SARGANT J. income they are to pay to the tenant for life. There is no reason why the tenant for life should not be entitled to the income of the fund after the expiration of the first year in the same way as he would be entitled to the income of the fund required for the payment of a contingent legacy. The somewhat novel scheme stated in clause 2 of the summons suggested by Sir William Plender in his evidence is inconvenient as a matter of book-keeping and moreover is in contradiction to clause 15 of the will. As regards the rate of interest in *In re McEuen* (1) the rate of 4 per cent. was taken by agreement because that was really about the average rate of interest. In the present case we would agree that an average rate of 5 per cent. over the whole period should be adopted on the ground of simplicity, while as regards liabilities carrying interest such as estate duty we submit that the actual interest at 3 per cent. only should be thrown on the tenants for life, and the principal paid out of capital.

*Martelli, K.C.*, and *H. J. H. Mackay*, for the infant remaindermen. It may be to the advantage of the remaindermen to adopt the scheme propounded by Sir William Plender stated in clause 2 of the summons, but there appears to be no authority in support of it. Failing that we support the principle stated in clause 3 (c), which is in accordance with *In re McEuen*. (1) As regards the rate of interest for the purpose of the necessary calculation there is no reason why the average rate of income in each year, which has been ascertained, should not be adopted for that year. As regards the estate duty the total amount payable for capital and interest ought to be treated as the debt or liability to be discharged.

SARGANT J. This summons raises various questions arising in the administration of the estate of the late Sir Frederick Wills and the points at issue involve considerable sums, though they are comparatively small in proportion to the whole amount of the estate.

The questions arise with regard to the application of the doctrine of *Allhusen v. Whittell* (2) as interpreted—I hope that is the right word—by myself in *In re McEuen*. (1) The first

(1) [1913] 2 Ch. 704.

(2) L. R. 4 Eq. 295.

question raised by the summons is whether the rule in *Allhusen v. Whittell* (1) is excluded altogether by certain expressions in the will of the testator. In my judgment those expressions are not sufficient to exclude the rule, which is therefore a rule to be applied in the present case. The second question raised by the summons is whether in applying the rule the Court ought to form, for the purpose of calculation, what is called a deductible fund, namely, the fund necessary to pay the liabilities, and to deprive the tenant for life of income on that deductible fund during the first year—I am only dealing with the first year at present for the purpose of simplicity—and then add the interest on the deductible fund at the end of the year to the remaining capital and give to the tenant for life thereafter the income on the remaining capital plus the interest so added to it, or whether the Court ought to treat the tenant for life as deprived only of such a sum as together with the income on that sum will be sufficient to discharge the liabilities. In my opinion the latter is the true principle, although I quite recognize that in many cases the calculation on the former principle would be a slightly easier one. The rule in *Allhusen v. Whittell* is clearly stated in the Vice-Chancellor's judgment (2): "There appear to be two points well covered by authority. One is, that every tenant for life of residue is entitled to the income of all such part of the residue as is not required for the payment of debts, and which is found to be in a proper state of investment," and then he says that a sort of equitable bookkeeping has to be indulged in by the Court for the purpose of arriving at the true result. In applying that rule to the present case I do not see how the income to which the tenant for life is to be entitled is to be one sum during the first year and a larger sum at the end of the first year. In my opinion a calculation must be adopted under which the residue will be the same throughout the whole period.

Then comes a third question, whether the process of *Allhusen v. Whittell* (1) is to be continued after the expiration of the first year in cases where, as here, large sums in respect of liabilities—using the term in a broad sense—are expended after the

(1) L. R. 4 Eq. 295.

(2) L. R. 4 Eq. 302.

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SARGANT J. expiration of the first year. It is suggested that during the period between the end of the first year and the time when those liabilities are discharged in the second or third year the tenant for life is in some way or other to become entitled to a larger income or income on a larger fund than will ultimately be available for the purposes of the tenant for life and remaindermen. There again the passage which I have quoted from the judgment in *Allhusen v. Whittell* (1) seems to be decisive. The portion of the estate required for the payment of debts does not become part of the residue because the debt for the payment of which it is required does not happen to be paid during the first year. When it is once ascertained that a portion of the estate has to be applied in payment of a debt, whether that debt is paid in the first year or in the second or third year, that portion of capital is ex hypothesi no portion of residue. It is excluded by the very definition of the term residue. In my opinion therefore my dictum—I am not quite sure that it was a dictum only—in *In re McEuen* (2) must be applied, and the tenants for life are not entitled to the income of any part of the estate which is used for the payment of debts paid after the expiration of the first year. The result will of course be that the amount of capital the income on which they will lose will be rather less than in the case of debts paid during the first year, because it will be the income on that part of the capital which together with the income thereon for a longer period, namely, down to some date in the second or third year, will be sufficient to pay the debt.

The fourth question is at what rate the interest ought to be calculated for this purpose. It is obviously to the advantage of the remaindermen that the interest should be calculated at as high a rate as possible, because that results in a larger proportion of the debts being paid out of income and a smaller proportion being paid out of capital. The rate of interest earned by the estate varied from between 4·9 per cent. during the first year to 5·9 per cent. during the year ending on March 2, 1912, and then it rose suddenly by reason of the falling in of a reversion and became equal to 9·3 per cent. As a matter of fact that very high rate of interest is not of much importance

(1) L. R. 4 Eq. 302.

(2) [1913] 2 Ch. 704.

here, because so small an amount of liabilities remained to be discharged in that year, but I think that the strict rule on which counsel for the remaindermen insist is to take the average rate of interest in each year. No doubt in the majority of cases it would not be necessary to go through that process, and a much rougher and readier method of calculation would be sufficient, because really the difference in the two methods would be almost infinitesimal, but in the present case, in which the general figures are large, and the income earned during each year has been carefully ascertained, I do not see why the very eminent accountants who have been employed should not make out the figures on the strict basis.

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With regard to the payment of estate duty, estate duty itself carries interest at the low rate of 3 per cent., but there again, though in the case of small estates or estates of moderate size it might very often be a good rough and ready rule to allow the interest on the estate duty to be paid out of income and the capital to be paid out of capital, in strictness it seems to me that the amount paid both for capital and interest in respect of the estate duty ought to be treated as being the debt or liability to be discharged, and to be apportioned between capital and income on the principle which I have stated.

Solicitors: *Adams & Adams; Russell Cooke & Co.*

A. C.

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[1914 R. 063.]

March 1, 2, *Patent—Petition for Compulsory Licence—Patents and Designs Act, 1907*  
3, 12.  
(7 *Edw. 7, c. 29*), s. 24.

The object of s. 24 of the Patents and Designs Act, 1907, relating to the grant of a compulsory licence is to meet failure on the part of the patentee to satisfy the reasonable requirements of the public as distinct from those of particular individuals.

Mere default in supplying the patented article or granting a licence to an individual does not necessarily amount to default in supplying the patented article or granting licences within the meaning of sub-s. 5 (a) of the section.

The expression "trade or industry" in sub-s. 5 (a) is to be read in a wide sense, as one speaks of the cotton or woollen trade or industry, so that it is not enough to establish that a particular trader is unfairly prejudiced; it must be further proved that the trade or industry as a whole is thus affected.

The "establishment of any new trade or industry" referred to in sub-s. 5 (a) is a different thing from the entry of a particular person into an existing trade or industry.

The "demand" referred to in sub-s. 5 (a) is not the demand of a particular person, but that of the public at large.

If the default towards the public is established, s. 24 confers two alternative rights: first, a right in the individual who presents the petition to have a licence granted to himself; and, secondly, a right, in the public, in the circumstances mentioned in sub-s. 3, to be relieved from the effects of the patentee's monopoly by the revocation of the patent.

An order under s. 24 should not take the form of a general direction to grant licences, but should direct the grant of a licence to the petitioner. Another person requiring a licence would have to present a petition of his own.

A patentee may use the advantage given by his patent either by putting it in operation himself and supplying the public with the article or by licensing others to do so. If he himself maintains an adequate supply there is no necessity from the public point of view for a grant of licences, and sub-s. 5 of s. 24 contemplates these alternatives as legitimate modes of working a patent. It is not enough, therefore, for a petitioner to prove that the patentee makes default in one of these alternative modes; he must prove that the patentee has made default in the other also.

The petitioners were the proprietors of a patent of 1911 for an improvement in incandescent electric lamps with two filaments and therefore alleged to have greater durability than the ordinary type of

lamp with one filament only, and to make their invention a commercial success desired to use drawn tungsten wire. The two respondents were the respective owners of several patents relating to incandescent electric lamps with drawn tungsten wire filaments, the manufacture of such wire being covered by the patents, and had granted to each other and to other persons licences thereunder, and thus through themselves and their licensees controlled the industry to a large extent. To prevent the cutting of prices the respondents required from their licensees an undertaking not to sell their lamps below certain list prices, the result being that the price in this country was considerably higher than abroad, but not so high as in the opinion of the Court to be unreasonable, while the supply of lamps was adequate to meet the demands of the public. The petitioners or their predecessors in title had requested one of the respondents to quote a price for the making for the petitioners of their double filament lamps, which the respondent consented to do, stipulating, however, that the lamps should not be sold at a price less than one shilling in excess of the respondents' price list. The petitioners declined this offer and applied to both the respondents to supply them with the wire made under the patents relating thereto, which both the respondents declined to do. The petitioners then inquired on what terms each of the respondents would grant a licence to manufacture the wire. Neither of the respondents complied with this request, though one of them offered to sell the wire at a price which the petitioners regarded as excessive. This petition for the grant of a compulsory licence was then presented. There was no trade or industry with which the wire was connected except the making and selling of electric lamps, and there was no demand for the wire except in that connection:—

*Held*, that the petitioners had failed to establish a case for the grant of a compulsory licence under s. 24.

#### PETITION WITH WITNESSES.

This was a petition presented under s. 24 of the Patents and Designs Act, 1907 (1), and referred to the Court by the Board of

(1) Patents and Designs Act, 1907, s. 24: “(1.) Any person interested may present a petition to the Board of Trade alleging that the reasonable requirements of the public with respect to a patented invention have not been satisfied, and praying for the grant of a compulsory licence, or, in the alternative, for the revocation of the patent.

“(2.) The Board of Trade shall consider the petition, and if the parties do not come to an arrange-

ment between themselves the Board of Trade, if satisfied that a prima facie case has been made out, shall refer the petition to the Court, and, if the Board are not so satisfied, they may dismiss the petition.

“(3.) Where any such petition is referred by the Board of Trade to the Court, and it is proved to the satisfaction of the Court that the reasonable requirements of the public with reference to the patented invention have not been satisfied, the patentee

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Trade, for the grant of a compulsory licence under nine patents, six of which were owned by the British Thomson-Houston Company, and the remaining three by Siemens Brothers & Co.

The petition stated in paragraph 1 the grants of nine patents (collectively referred to as the Association patents), namely, (1.) a patent dated September 20 of 1904, No. 20,277, for an invention of improved manufacture of incandescent bodies for electric glow lamps; (2.) a patent dated September 28 of 1906, No. 21,513\*, for an invention of process and apparatus for the treatment of metallic tungsten and for the manufacture of electric filaments therefrom; (3.) a patent dated March 22, 1906, No. 3174

may be ordered by the Court to grant licences on such terms as the Court may think just, or, if the Court is of opinion that the reasonable requirements of the public will not be satisfied by the grant of licences, the patent may be revoked by order of the Court.

"Provided that an order of revocation shall not be made before the expiration of three years from the date of the patent, or if the patentee gives satisfactory reasons for his default.

"(4.) On the hearing of any petition under this section the patentee and any person claiming an interest in the patent as exclusive licensee or otherwise shall be made parties to the proceeding, and the law officer or such other counsel as he may appoint shall be entitled to appear and be heard.

"(5.) For the purposes of this section the reasonable requirements of the public shall not be deemed to have been satisfied—

"(a) if by reason of the default of the patentee to manufacture to an adequate extent and supply on reasonable terms the patented article, or any parts thereof which are

necessary for its efficient working, or to carry on the patented process to an adequate extent or to grant licences on reasonable terms, any existing trade or industry or the establishment of any new trade or industry in the United Kingdom is unfairly prejudiced, or the demand for the patented article or the article produced by the patented process is not reasonably met; or

"(b) if any trade or industry in the United Kingdom is unfairly prejudiced by the conditions attached by the patentee before or after the passing of this Act to the purchase, hire, or use of the patented article or to the using or working of the patented process.

"(6.) An order of the Court directing the grant of any licence under this section shall, without prejudice to any other method of enforcement, operate as if it were embodied in a deed granting a licence and made between the parties to the proceeding."

of 1907, for an invention of manufacture of ductile tungsten or alloys thereof; (4.) a patent dated July 18 of 1907, No. 16,530, for an invention of improvements in and relating to refractory metallic electrical conductors for use in incandescent electric lamps and the like; (5.) a patent dated September 22 of 1908, No. 19,932, for an invention of manufacture of filaments for electric incandescent lamps from tungsten or alloys thereof; (6.) a patent dated October 14 of 1909, No. 23,499, for an invention of improvements in and relating to the treatment of tungsten to facilitate working; (7.) a patent dated February 3 of 1910, No. 2759, for an invention of improvements relating to the obtaining of ductile or malleable bodies of high melting point metals; (8.) a patent dated April 2 of 1910, No. 8031, for an invention of improvements relating to tungsten and the manufacture thereof; (9.) a patent dated January 13 of 1911, No. 17,722, for an invention of improvements in methods of wire drawing. The petition continued:

"2. The nature of the petitioners' interest in the matter is as follows:—The petitioners are a limited company formed for the purpose of manufacturing and selling in the United Kingdom lamps in accordance with the subject-matter of certain letters patent No. 6856 of 1911 granted to Joseph Theodore Robin for an invention of improvements in or relating to incandescent electric lamps, and they cannot hope to be successful in establishing or developing a trade or industry in their said lamps unless the filaments of their proposed lamps are formed of drawn tungsten wire such as is used in the lamps sold under the protection of the Association patents.

"3. The circumstances of the case are as follows:—

"(i.) The British Thomson-Houston Company are the registered legal owners of the above mentioned patents No. 21,513\* of 1906, No. 16,530 of 1907, No. 23,499 of 1909, No. 2759 of 1910, No. 8031 of 1910, and No. 17,722 of 1911. Messrs. Siemens Brothers & Co. are the registered legal owners of the above mentioned patents No. 20,277 of 1904, No. 3174 of 1907, and No. 19,932 of 1908. The said British Thomson-Houston Company and Siemens Brothers & Co. are hereinafter referred to as the patentees.

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“(ii.) The petitioners are the registered legal owners of the said letters patent No. 6856 of 1911.

“(iii.) The petitioners are as aforesaid a company formed for the purpose of manufacturing and selling in the United Kingdom lamps constructed in accordance with the invention which is the subject-matter of the said letters patent No. 6856 of 1911.

“(iv.) The petitioners cannot hope to make adequate profits by the manufacture and sale of their proposed lamps unless the filaments used in their said lamps are of the latest and most economical kind.

“(v.) The petitioners desire to use for their proposed lamps filaments of drawn tungsten wire as being the material best suited to their purpose.

“(vi.) The British Thomson-Houston Company claim that the said patent No. 21,513\* of 1906 is a fundamental patent relating to drawn tungsten wire filaments and lamps. The petitioners do not desire to court an action on such letters patent or any other of the Association patents.

“(vii.) The petitioners desire to be supplied with or to supply themselves with drawn tungsten wire such as is used in the lamps being sold in the United Kingdom under the protection of the Association patents.

“(viii.) The petitioners have applied to the patentees and their various licensees for the supply of drawn tungsten wire covered by the Association patents and have in each case been met with a refusal to supply the wire at all or to grant licences to the petitioners under the Association patents or any of them except in the case of the British Thomson-Houston Company, who when applied to offered to sell to the petitioners wire at 125s. per 1000 feet for lamps for 25 watts up to 100 watts at 100 volts.

“(ix.) The said price of 125s. per 1000 feet for wire is wholly unreasonable and prohibitive for with wire at this price the petitioners would not be able to place their lamp on the market with any reasonable prospect of success.

“(x.) The petitioners can obtain wire similar to that used by the patentees and their licensees in lamps sold under the

protection of the Association patents from various sources abroad at the price of about 40s. per 1000 feet.

“(xi.) The Association patents cover the manufacture of wire as distinct from the manufacture of lamps.

“(xii.) The patentees do not (otherwise than as stated in subparagraph viii.) themselves or through any of their licensees sell or offer for sale to the public wire made in accordance with the Association patents apart from lamps with filaments constructed of such wire.

“(xiii.) The patentees and their existing licensees have formed themselves into a ring or trust under the name of ‘The Tungsten Lamp Association,’ which consists at present of the firms and companies following, viz. :

“The General Electric Company of London.

“The British Thomson-Houston Company of Rugby.

“Siemens Brothers & Company of London.

“The Edison and Swan United Electric Light Company of London.

“The British Westinghouse Electric and Manufacturing Company of Manchester.

“The Stearn Electric Lamp Company of London.

“The ‘Z’ Electric Lamp Manufacturing Company of London.

“The Electrical Company of London.

“The Foster Engineering Company of Wimbledon and

“The Phillips Electric Lamp Company of Eindhoven, Holland.

“(xiv.) The members of ‘The Tungsten Lamp Association’ are all either owners of or licensed under the Association patents and sell lamps at such prices only as are fixed by the Association. By the practice of selling to the public complete lamps and not the wire apart from made up lamps the patentees through the Association compel the public to pay exorbitant prices for the wire made under the Association patents and also reap large profits from the manufacture of lamps as distinct from the manufacture of wire under the Association patents and so maintain a practical monopoly in tungsten drawn wire lamps.

“(xv.) The petitioners are willing to pay reasonable royalties in respect of wire made, used or vended by them which is covered by the Association patents or any of them.

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“(xvi.) The patentees by their refusal to supply the petitioners with wire covered by the Association patents at reasonable prices or to license the petitioners to make, use, exercise and vend tungsten wire under the Association patents upon payment to the patentees of reasonable royalties fail to satisfy the requirements of the petitioners and unfairly prejudice the establishment of the new trade or industry in lamps protected by the petitioners said letters patent No. 6856 of 1911 which the petitioners are desirous of setting up in the United Kingdom.”

Having regard to the circumstances of the case the petitioners alleged that “the reasonable requirements of the public with respect to the invention patented as above stated have not been satisfied,” and prayed that an order might be made granting to them a compulsory licence on the following terms, namely, that “the petitioners shall be at liberty to make, use, exercise and vend tungsten wire in accordance with the inventions covered by the Association patents, or any of them, upon payment of such royalties as shall in the circumstances be deemed reasonable, the petitioners keeping and rendering accounts of all such wire made, used or sold by them, and paying the royalties within three calendar months of the day upon which the same shall become due.”

The nature and effect of the petitioners’ evidence in support of the petition are fully stated in the judgment. In the result no evidence was called on the part of the respondents.

*W. R. Bousfield, K.C., Cave, K.C., and R. Frost*, for the petitioners. The fact that there are no less than nine patents under which the licence is sought is immaterial. There might be some difficulty on this ground if it were a question of revocation of a patent under sub-s. 3; but admitting the validity of all nine patents we ask for a licence under all. The petitioners’ case is that there has been a refusal to sell drawn tungsten wire to the petitioners or to license the petitioners to manufacture it on reasonable terms, and in consequence the demand for the patented article or the article produced by the patented process is not reasonably met and the establishment of the petitioners’ particular trade or industry is unfairly prejudiced. The price

at which the British Thomson-Houston Company offered to sell the wire would according to our evidence work out as an addition for wire alone of about 10*d.* to the cost of a lamp, which apart from wire would be about 4*d.*, and was wholly unreasonable. The price of the wire in foreign countries is much lower. The Court will not allow the patentees to use their patent rights in tungsten wire so as to establish a monopoly in electric lamps. The question of reasonableness is not to be regarded solely from the point of view of the patentee. If it were, the section would be practically worthless. So far as the interests of the patentee are to be taken into account as an element in considering what is reasonable, the Court will look at the cost of manufacture, the value of the article, and the reward which the patentee has already received as the result of his monopoly; and in this connection it is important to remember that no prolongation of a patent was ever allowed where a profit of 20,000*l.* had been received by the patentee. We are prepared to take a licence to manufacture the wire solely for the purpose of manufacturing our lamps. The only authority at all bearing on s. 24 of the Patents and Designs Act, 1907, is the judgment of Parker J. in *In re Hatschek's Patents* (1), which was a case under s. 27. There are four reported cases on the subject of compulsory licences under s. 22 of the Patents, Designs and Trade Marks Act, 1883—*Continental Gas Glühlicht Actien Gesellschaft (Meteor) Petition* (2); *Levinstein's Petition* (3); *Hulton and Bleakley's Petition* (4); *Gormully and Jeffery Manufacturing Co.'s Petition* (5)—but these cases do not seem to be of much assistance in interpreting s. 24 of the present Act.

*A. J. Walter, K.C., J. Hunter Gray, and E. Lunge*, for the British Thomson-Houston Company, were called on to address the Court on the case as it stood on the petitioners' evidence. No case has been made out for the grant of a compulsory licence even on the petitioners' own evidence. Sects. 24 and 27 of the Patents and Designs Act, 1907, were aimed against patentees who act unreasonably either in not using their patents or in so

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(1) [1909] 2 Ch. 68.

(3) (1898) 15 Rep. Pat. Cas. 732.

(2) (1898) 15 Rep. Pat. Cas. 727.

(4) (1898) 15 Rep. Pat. Cas. 749.

(5) (1899) 16 Rep. Pat. Cas. 641.

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using them that the public do not get the benefit of the article. The petitioners have failed to show that the public are injured; they only show at the most that they, an individual firm, have been refused a licence. It was not the intention of the Legislature to enact that every person desiring to work under the patent can demand a licence under s. 24, or to interfere with the patentee's monopoly—the terms of which are the same as before—to that extent. Sect. 24 is aimed at an abuse of the monopoly and is intended to ensure that there shall be a sufficient supply to the public at large of the patented article. The public demand is amply met in the present case. The petitioners are not establishing a new trade or industry, but entering on one which is already established.

*H. A. Colefax, K.C., and G. H. Hume, for Siemens Brothers & Co., supported the same arguments.*

*W. R. Bousfield, K.C., in reply.* In dealing with s. 24 there are three separate interests to be considered, those of the person demanding the licence, those of the public, and those of the patentee. In the present case, owing to the combination between the owners of and licensees under the several patents which command this industry, the public is made to pay a higher price for their lamps, and the combination is against the interests of the public. It is contrary to public policy to allow the tungsten wire patents to be used to support such a combination. The petition is rightly framed in dealing with the patents as a group, and this must necessarily be the case where there is an original patent and subsequent improvement patents. There is no difficulty in fixing a royalty in such a case. It is said that the petitioners are acting in their own interests and not in the interests of the public, but the establishment of a new trade or industry necessarily results in a benefit to the public. The expression "new trade or industry" in sub-s. 5 refers no doubt to something more general than the entry of a particular person into business, but the petitioners are establishing a new trade or industry in the wider sense, and every new trade or industry even in the wider sense must have reference to a particular person who commences it. There has been no trade in drawn tungsten wire as such, and the public

demand for it must have a commencement, which is when the first persons—in this case the petitioners—make a demand for it.

*Cur. adv. vult.*

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March 12. WARRINGTON J. delivered the following written judgment:—This is a petition presented by the Robin Electric Lamp Company, Limited, under s. 24 of the Patents and Designs Act, 1907, praying for the grant of a compulsory licence under nine patents, of which six are owned by the British Thomson-Houston Company, Limited, and the remaining three by Siemens Brothers & Co., Limited. These two companies have been made parties to the proceedings and appear to resist the claim of the petitioners. Neither the law officer nor any counsel on his behalf appears.

This is, I believe, the first petition under the section to come before the Court, and it is, therefore, necessary to consider with some care what is the true construction and effect thereof. I should also say that I have referred to the four reported cases under the Patents, Designs and Trade Marks Act, 1883, but I do not find that they give me any assistance in interpreting s. 24 of the present Act.

Sect. 24 is the first of a group of sections under the heading "Compulsory Licences and Revocation." Sect. 27 is a section in the same group. In *In re Hatschek's Patents* (1) Lord Parker, then Parker J., makes the following remarks as to the object and purpose of the two sections:—"The mischiefs which s. 27 and s. 24 of the Act were intended to meet are well known. It was felt to be intolerable that letters patent for inventions which create monopolies, and are therefore in themselves contrary to the spirit of the common law as being restraints on trade, and which were only excepted from the operation of the Statute of Monopolies for the encouragement of trade and inventions useful in trade, and in consideration of the disclosure of such inventions to the public, should be used (as they had in fact been used) to prevent the development of new industries or to fetter existing industries in this country. Sects 24 and 27

(1) [1909] 2 Ch. 68, 81.



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of the Act are intended to prevent this being any longer possible. Sect. 24 deals primarily with cases where the trade of this country has been injured by an abuse of the monopoly conferred by the patent, irrespective of anything which is being done abroad. Sect. 27 deals primarily with cases where the object or effect of the use of such rights in the way they have been used has been to favour the development of industries abroad at the expense of industries in the United Kingdom. The sections may sometimes overlap, but this is the broad dividing line between them." I desire to adopt this statement as my own.

I propose to read the whole of s. 24, which is in the following terms. [His Lordship read the whole section and continued :] The words "shall not be deemed to have been satisfied" should, I think, be read "shall be deemed not to have been satisfied." This is their plain meaning, and in referring to the section hereafter I shall use the latter expression. It is obvious to any one reading the section that what it is designed to prevent is the failure of the patentee to satisfy the reasonable requirements of the public as distinct from those of particular individuals. It is this failure which is in terms made the ground of the petition in sub-s. 1, and the ground for the order of the Court in sub-s. 3.

The same conclusion is to be drawn from the language of sub-s. 5, which specifies particular circumstances in which, if proved to exist, the reasonable requirements of the public shall be deemed not to have been satisfied. Mere default to supply the patented article or to grant a licence to an individual would not, in my opinion, necessarily amount to default to supply the patented article or to grant licences. There may well be an adequate supply of the patented article to satisfy the requirements of the public, or the patentee may have granted an adequate number of licences on reasonable terms to satisfy the same requirements, and in that case his refusal to supply or grant a licence to a particular person would not be a default within the meaning of the section.

It seems to me, therefore, that in order to establish a case within the section the petitioner must prove not only default

towards himself, but default towards the public generally, or that part of it which is interested in the matter in question.

Again the expression "trade or industry" seems to me to be used in a wide sense, as we speak of the cotton trade or industry, or the woollen trade or industry, so that it is not enough to establish that a particular trader is unfairly prejudiced; it must be further proved that the trade or industry as a whole is thus affected. So also the establishment of a new trade or industry is, in my opinion, a different thing altogether from the entry of a particular person into an existing trade or industry. It is true that the establishment of a new trade or industry may, and in some cases must, be the work of one individual, but I think there would be no difficulty in distinguishing such a case from those to which I have just referred. Lastly, the "demand" referred to at the end of sub-clause (a) is not, I think, the demand of a particular person, but that of the public at large.

Sub-clause (b) of sub-s. 5 is not in question in the present case, and I therefore do not discuss its meaning or effect.

If the default towards the public is established, the section then confers two alternative rights: first, a right in the individual, who presents the petition, to have a licence granted to himself; and, secondly, a right in the public, in the circumstances mentioned in sub-s. 3, to be relieved from the effects of the patentee's monopoly by the revocation of the patent. Although the use of the plural "licences" in sub-s. 3 suggests that the order may take the form of a general direction to grant licences, I think the provisions of sub-s. 1 and of sub-s. 6 show that this should not be the form, but that the order should direct the granting of a licence to the petitioner. Another person desiring a licence would have to present a petition of his own.

I have now to determine whether on the facts of the present case the petitioners have established the existence of the circumstances in which, under sub-s. 5, the reasonable requirements of the public are to be deemed not to have been satisfied.

The petitioners are the proprietors of a patent for an improvement in incandescent electric lamps consisting of a contrivance

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whereby in a lamp with two filaments the current may be readily switched off from one filament and on to the other, so that the lamp is not rendered useless by the breaking of one filament. The petitioners allege that double filament lamps fitted with their patented contrivance have the advantage of much greater durability than that enjoyed by lamps of the ordinary type with only one filament.

As the best material for the filament in their lamps the petitioners desire to use drawn tungsten wire.

The two respondent companies, together with the General Electric Company, are the owners of a large number of patents, including the nine the subject of this petition, relating to incandescent electric lamps with drawn tungsten wire filaments. These three companies have pooled their patents—that is, they have granted each other licences thereunder, and they thus control to a large extent the industry connected with the lamps of the kind above mentioned. To prevent the cutting of prices and thus to ensure their profits, they require from the dealers who take their wares and from licensees an undertaking not to sell below certain list prices. The firms and companies, owners of and licensees under the patents above mentioned, are known as the “Tungsten Lamp Association.” The result is that the price of lamps with a filament of drawn tungsten wire is considerably higher in this country than it is abroad. There is, however, no evidence that the price is so high as to be a serious burden to the consumer or to be unreasonable, and in fact it has in the last two or three years been considerably reduced. The supply of lamps is adequate to meet the demands of the public. The nine patents selected by the petitioners as those under which they claim a licence relate to the manufacture of drawn tungsten wire and are selected for that reason. A company called the R. F. Syndicate, the predecessors of the petitioners, in the first instance requested the Siemens Company to quote for the making for them of the double filament lamp with their patented contrivance. The Siemens Company consented to do so, stipulating, however, that the lamps should not be sold at a price less than 1s. in excess of the Association's list price. I infer that this addition was proposed having regard to the longer life which the double

filament lamp was likely to enjoy as compared with that having a single filament only. WARRINGTON J.

The petitioners, as the successors of the R. F. Syndicate, declined to accept these terms, and in July, 1913, they applied to both companies to supply them with the wire, stating that they desired to manufacture their lamps themselves. I think this application was intended by them, and was understood by the respondent companies, to be an application for a supply of wire under the patents relating to drawn tungsten wire, whatever they might be. Both companies declined to supply the wire, the British Thomson-Houston Company at the same time offering to manufacture the lamps. The petitioners then proceeded to inquire on what terms each of the respondent companies would grant a licence to manufacture the wire, not specifying, however, any particular patents. Neither of the respondent companies complied with this request, though they did not in terms reject it. The British Thomson-Houston Company, on being threatened with the present petition, offered to sell the wire at a price which would involve the addition for wire alone of about 10d. to the cost of a lamp which would otherwise cost about 4d. A drawn tungsten wire can be obtained on the Continent at a cost very much less than that asked by the British Thomson-Houston Company.

This petition was then presented. It was founded on the allegation that drawn tungsten wire is the patented article or the article manufactured by the patented process, that the patentees have failed to supply this to the petitioners, or to grant a licence to them on reasonable terms, and that the establishment of what the petitioners call the new trade or industry concerned with the making and selling of lamps with their particular improvement has been thereby unfairly prejudiced. It has been established on the petitioners' own evidence that there is no trade or industry with which drawn tungsten wire is connected except that concerned with the making and selling of electric lamps, and there is no demand for the wire except in that connection.

It is true that the respondent companies have not complied with the petitioners request for licences. Have they thereby

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failed to grant licences on reasonable terms within the meaning of the Act? Quite independently of the fact that they never had an opportunity before this litigation of considering terms, whether reasonable or not, and were not told under what particular patent a licence was required, I am of opinion that the petitioners have not proved that they have been guilty of the default indicated by the Act. A patentee may use the advantage given by his patent either by putting it into operation himself and supplying the public with the article or by licensing others to do so. If he himself maintains an adequate supply there is no necessity from the public point of view for the granting of licences, and, in my opinion, sub-s. 5 contemplates these alternatives as legitimate modes of working a patent. It is not enough, in my judgment, for a petitioner to prove that the patentee makes default in one of these two alternative modes; he must prove that he has made default in the other also. In the present case, on the petitioners' own evidence, I find that there is no default in the matter of supply for the only purpose, namely, as filaments in lamps, for which the wire is required, and that the needs of the public are amply supplied in this respect. Moreover, the petitioners have not proved as regards licences any default except in reference to themselves; on the contrary, it is common ground that licences have been granted, and no attempt has been made to show that the terms were unreasonable.

Again, even assuming, though if necessary I should not be prepared to find that it is the fact, that the price proposed to be charged by the British Thomson-Houston Company was unreasonable, I should not on the principles of construction already indicated be able to hold that their conduct in this respect, concerning as it did a single individual only, was a failure to supply within the meaning of the Act. The same reasoning would apply to the refusal of the Siemens Company to supply the wire at all.

Moreover, in my opinion, the trade or industry to be considered is that of the making of tungsten filament electric lamps, and the starting by the petitioners of a trade in their particular lamp would not be the establishment of a new trade

or industry. It would be nothing more than the entry of a fresh trader into an existing trade or industry. There is no ground for the suggestion that the trade or industry has been unfairly prejudiced by any act or omission of the respondents.

On the whole, on the petitioners' own evidence, I come to the conclusion that they have failed to establish the case required by the Act, and I must therefore dismiss the petition with costs.

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COMPANY'S  
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*In re.*

Solicitors: *Ashurst, Morris, Crisp & Co.; Bristows, Cooke & Carmichael.*

A. C.

*In re* DEMPSTER.

SARGANT J.

BORTHWICK v. LOVELL.

1915

Feb. 10.

[1914 D. 1287.]

*Administration — Annuities — Pecuniary Legacies — Deficiency of Assets —  
Purchase of Annuities in Names of Trustees.*

By a will certain pecuniary legacies were given to relations, and two annuities were given to two ex-servants of the testatrix, who directed that her trustees should provide for the annuities by setting aside and appropriating a portion of her estate sufficient to answer them by the income thereof; that until such appropriation the annuities should be paid out of the residuary estate; and that upon cesser of an annuity a proportion of the capital so set aside and appropriated should sink into and form part of her residuary estate. She also declared that neither annuitant should be allowed to have the value of the annuity in lieu thereof, and that if the annuitant should do or suffer any act or thing whereby the annuity should be assigned, charged, or incumbered, the annuity should thenceforth cease to be payable. She gave her residuary estate in trust for other persons. The estate was sufficient to pay all the pecuniary legacies in full and to provide sums enough to purchase annuities of the amounts given by the will, but was not sufficient to pay the legacies in full and to provide two funds sufficient by their income to pay the annuities in full :—

*Held*, (1.) that the declaration as to cesser of the annuity on assignment, charge, or incumbrance was not repugnant to the previous gift of the annuities, but that there was a good gift over, on such an event happening, to the residuary legatees; (2.) that sums sufficient to buy annuities of the amounts mentioned in the will must be set aside, but (3.) that the annuitants, having regard to the fact that their annuities were determinable, were not entitled to payment of the sums set aside,

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but that those sums must be invested by the trustees in the purchase of annuities to be paid to the annuitants for their lives or until they should assign, charge, or incur them.

The principles of *In re Cottrell* [1910] 1 Ch. 402; *Carr v. Ingleby* (1831) 1 De G. & Sm. 362, n.; and *In re Ross* [1900] 1 Ch. 162 followed.

*In re Sinclair* [1897] 1 Ch. 921 distinguished.

CHARLOTTE LOUISA HAWKINS DEMPSTER by her will, dated June 11, 1912, appointed the plaintiffs, and another person who renounced probate, executors and trustees of her will, and gave certain legacies (including a legacy of 6000*l.* to the Honourable Eileen O'Brien). The will then contained the following clause:—"I bequeath the following annuities, videlicet: To my excellent cook-housekeeper Harriet Lovell an annuity of 40*l.*, whether she is in my service at the date of my death or not; to my old coachman Giovanni Pittaluga (called Savona), of 3, Rue Cabris, Cannes, an annuity of 40*l.*, the said annuities to be paid quarterly, the first payment to be made three months after the date of my death. And I direct my trustees or trustee to make provision for the said annuities by setting apart and appropriating a portion of the investments comprised in my estate at the date of my death which shall be sufficient in their opinion to answer the said annuities by the income thereof, and that, until such appropriation, I declare that the said annuities shall be paid out of my residuary estate, and that, upon the cesser of either of the said annuities, a proportion of the capital so set apart and appropriated shall sink into and form part of my residuary estate. And I declare that the said Harriet Lovell and Giovanni Pittaluga shall not be allowed to have the value of the said annuity given to them in lieu thereof. And I further declare that, in case either of the said annuitants shall do or suffer any act or thing whereby the said annuity or any part thereof shall be assigned, charged, or encumbered, the said annuity shall cease to be payable to the said annuitant and shall thenceforth cease to be payable."

The testatrix gave, devised, and bequeathed her residuary estate and effects to her trustees upon trust to convert the same into money, and, after paying thereout her funeral and testamentary expenses and debts, and the legacies and annuities

bequeathed by the will, to stand possessed of the residue upon trust for such of the unmarried daughters of the late Major the Honourable Charles James Keith-Falconer as should be living at the time of her death, in equal shares.

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The testatrix died on May 8, 1913. There were then three unmarried daughters of Major Keith-Falconer, one of whom was Miss Ida Madeleine Keith-Falconer. After paying debts, funeral and testamentary expenses, and duties the estate was sufficient to pay the legacies in full and provide for the purchase of Government or other annuities of the amounts of those given to Harriet Lovell and G. Pittaluga, but the estate was not sufficient to pay the legacies in full and also to allow of setting apart and appropriating sums sufficient to pay the annuities out of the income of the sums set apart.

The trustees and executors took out an originating summons against Harriet Lovell, G. Pittaluga, the Honourable Eileen O'Brien, and Miss Keith-Falconer, asking (1.) in what manner the trustees ought to apportion and deal with the estate in respect of and as between the legacies and annuities given by the will; and (2.) how they ought to deal with and apply the amounts to be set apart or paid out of the estate in respect of the annuities given to H. Lovell and G. Pittaluga. It was stated that the Government would not grant an annuity to a foreigner who was permanently resident abroad.

*Bryan Farrer*, for the plaintiffs, stated the facts and the questions involved.

*A. L. Ellis* (for *P. M. Walters*, on active service with His Majesty's Forces), for the defendant Keith-Falconer. Apart from authorities, the proper course is to buy annuities of the amounts of those given to H. Lovell and G. Pittaluga and to pay the legacies in full, as was directed by *Warrington J.* in *In re Cottrell*. (1) In that case, however, there was no provision for forfeiture on attempted alienation, so that there was no difficulty in valuing the annuity and paying the amount of the valuation to the annuitant. It would not be right, if it were possible, to value the annuity as a forfeitable one. Where

(1) [1910] 1 Ch. 402.



SARGANT J. an annuity was bequeathed to a woman during widowhood, provided she should not quit England before her daughter's marriage, and the assets were insufficient to pay the annuity and the legacies in full, the Court ordered the annuity to be valued and to abate proportionably with the legacies, and directed the amount of the apportionment in respect of the annuity to be laid out in the purchase, in the names of the annuitant and another person, of a Government annuity: *Carr v. Ingleby*. (1) But that case was not followed by Kekewich J. in *In re Sinclair*. (2)

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[SARGANT J. There the annuity was not given by the will, but was an obligation binding on the testator's estate by a deed. He also referred to *Wright v. Callender*. (3)]

Where an estate was insufficient and the capital value of an annuity bequeathed to a married woman with a restraint on anticipation was ordered to be laid out in the purchase of an annuity for her, and she died before it was purchased, North J. held that the capital belonged to her estate: *In re Ross*. (4)

A. F. Topham, for the annuitants. If the will is strictly followed and a sum sufficient by its income to pay the annuities is set aside, then, as between the legatees and the annuitants, the estate is insufficient. The annuitants are, therefore, willing to take something else, and ask that *In re Cottrell* (5) should be followed by valuing the annuities as at the time of the testatrix's death, and paying the amounts of the valuations to the annuitants.

[SARGANT J. It will be better for them to have the arrears of the annuities paid to them in full and to have the annuities valued as at the date of their purchase.]

The amounts of the valuations should not be invested in the purchase of annuities, but should be paid over to the annuitants. It is true that there is a clause in the will providing for cesser of the annuity in case of attempted assignment, charge, or incumbrance, but that is repugnant to the previous absolute gifts of the annuities and is void: *Stokes v. Cheek* (6); *Hunt-Foulston v. Furber* (7); Theobald on Wills, 7th ed. p. 501.

(1) 1 De G. & Sm. 362, n.

(2) [1897] 1 Ch. 921, 926.

(3) (1852) 2 D. M. & G. 652.

(4) [1900] 1 Ch. 162.

(5) [1910] 1 Ch. 402.

(6) (1860) 28 Beav. 620.

(7) (1876) 3 Ch. D. 285.

J. W. Manning, for the defendant *O'Brien*. The case is *SARGANT J.* entirely within *In re Cottrell* (1), except that there the annuity was not forfeitable. That difficulty in the present case can be got over by directing the annuities to be purchased in the names of the trustees and paid to the annuitants during their lives or until they shall attempt to assign or charge the annuities.

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*SARGANT J.* (after reading the will). There is a clear gift to each of the annuitants until she or he does or suffers something whereby the annuity is assigned, charged, or incumbered. Then the annuity is to cease to be payable, and in that event there is a gift over in trust for the residuary legatees. In my opinion, that is a perfectly good gift in favour of the residuary legatees if either annuitant attempts to assign, charge, or incumber the annuity.

The estate is sufficient to pay all the legacies in full and to provide sums sufficient to purchase annuities of the amounts given by the will; but it is not sufficient to pay the legacies in full and also to set aside two funds the income of which will be enough to pay the annuities in full. Then what ought to be done? It seems to me that the case of *In re Cottrell* (1) precisely applies to the present case except for the fact that here the annuities are determinable annuities, and I propose to follow the principles laid down in *In re Cottrell* (1) as being applicable here, and I may add that they appear to me to be perfectly right. Then comes the further question whether the annuitants, in view of the fact that the annuities are not absolute annuities to them but are determinable annuities, are entitled, in lieu of having the annuities purchased and held by the trustees upon trusts corresponding with or analogous to those declared by the will, to have the amount required to purchase the annuities paid over to them. It was clearly laid down in the case of *Carr v. Ingleby* (2) that where the annuity was determinable by an event occurring in the lifetime of the annuitant, the annuitant was not entitled to have the value of the annuity paid to her, but that the amount was to be applied in the purchase of an annuity to be paid to her for her life or until the occurrence of such event. And the same

(1) [1910] 1 Ch. 402.

(2) 1 De G. & Sm. 362, n.

SARGANT J. principle in effect was followed by North J. in *In re Ross* (1)—  
 1915 the case in which he recognized that where an annuity was given  
 ——— to a married lady without power of anticipation for her separate  
 DEMPSTER, use she was not entitled to receive the capital of the annuity but  
*In re.* was only entitled to the income of it from time to time. But it  
 BORTHWICK is said that those decisions have been qualified by or are incon-  
*v.* sistent with a case, before Kekewich J., of *In re Sinclair*. (2)  
 LOVELL. When, however, I come to look at *In re Sinclair* (2), it appears  
 ——— to me that it is not analogous, because that was a case where the  
 annuity in question was not one given under the will at all, but  
 was one which was subsisting quite independently of the will and  
 was an obligation binding on the testator's estate under some  
 deed. There the annuitant, coming from outside, had, under the  
 process familiar in bankruptcy, been admitted to prove for the  
 value of his determinable annuity, and it was shown that the  
 amount required to purchase a determinable annuity really was  
 the same as the amount required to purchase an absolute  
 annuity; and it does not appear to me that the case really throws  
 any light upon the case now before the Court.

It seems to me that, on principle, if an annuitant who has a  
 determinable annuity or is restrained from anticipation is com-  
 pelled to take a smaller annuity, that cannot alter the character  
 of the annuity itself. The annuitant has, in common with other  
 legatees, to take, say, 19s. in the pound instead of 20s. in the  
 pound, but I can see no reason why the 19s. in the pound should  
 not be paid upon precisely the same conditions on which the  
 20s. in the pound has been directed to be paid. Here fortunately  
 20s. in the pound is going to be paid to each of the annuitants,  
 and the only change that is made in the directions given by the  
 testatrix is this, that, in lieu of a capital fund being set aside, the  
 income of which would have been payable, pending assignment,  
 charge, or incumbrance, to the annuitants, arrangements will be  
 made either for a Government annuity in one case, or for an  
 annuity from a first-class insurance office in the other case.  
 But the mere substitution of that for a capital fund does not  
 seem to me to involve any change in the destination or character  
 of the annual payment itself. As to one of the annuitants there

(1) [1900] 1 Ch. 162.

(2) [1897] 1 Ch. 921.

is a difficulty about purchasing a Government annuity, because SARGANT J. he is a foreigner residing permanently abroad, but with regard to him Mr. Topham was prepared, if I was against him on his contention as to this annuitant being entitled to receive the value of the annuity, to have an annuity purchased in the name of some first-class insurance office to be approved by the annuitant. That being so, I think I ought to direct that the plaintiffs should purchase as trustees in their own names a Government annuity for the first annuitant and an annuity from a first-class insurance office approved by the second annuitant for the second annuitant, and that they should pay the income of the annuities to the annuitants during their lives or until they should respectively assign, charge, or incur them. In each case the amount of the annuity must be paid down to date, and a purchase must be made of an annuity to accrue henceforth.

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Solicitors for plaintiffs and the annuitants: *Hemsley & Co.*

Solicitors for defendant Keith-Falconer: *Walters & Co.*

Solicitors for defendant O'Brien: *Hasties.*

F. E.



SARGANT J. *In re* ROBERT STEPHENSON AND COMPANY, LIMITED.

1915

March 11, 12,  
23.

POOLE *v.* THE COMPANY.

[1909 R. 910.]

*Landlord and Tenant—Lease—Covenant not to assign or sub-let—Covenant running with Land.*

By a lease made in 1899 H. and P. (therein called “the lessors”) demised to X. and Y. (therein called “the lessees”) certain lands for a term of over seventy years, and the lessees covenanted with the lessors (amongst other things) as follows: that “the lessees will not at any time during the said term assign or sublet the said demised premises or any part thereof” or use the same in certain prohibited ways. An interpretation clause provided that “the expression ‘the lessors,’ used herein, shall, where the context so admits, include, besides the said H. and P., their respective executors, administrators, and assigns, and the expression ‘lessees,’ used in these presents, shall, where the context so admits, include, besides the said X. and Y., their respective executors or administrators.” In 1899 X. and Y., with the licence of their lessors, assigned the demised property to the S. company, which in 1915 wished to assign it to another company:—

*Held*, (1.) that, although “assigns” were not mentioned in the covenant, it was binding on the S. company, and that that company could not assign the demised property without the consent of the lessors; and (2.) that the fact that in the definition in the lease the word “lessees,” as contrasted with the word “lessors,” was not stated to include assigns did not show a sufficient indication of intention that the covenant should be personal only and not run with the land.

THIS was an originating summons (taken out by the plaintiff in an action for executing the trusts of a debenture stock deed executed by Robert Stephenson and Company, Limited) which, as amended, raised the question whether the assignees of the leasehold interest under an indenture of sub-lease dated July 24, 1899, were entitled to assign that interest without the licence or consent of their underlessors for the time being. The sub-lease in question was made between James Hall and Hilton Philipson (thereinafter called “the lessors”) of the one part and Sir Joseph Whitwell Pease and Sir Christopher Furness (thereinafter called “the lessees”) of the other part, and contained in clauses 1, 2, and 3 thereof a demise to the lessees of certain land and hereditaments at Hebburn, in the parish of Jarrow in the

county of Durham, for the residue of a term of ninety years from May 1, 1881, granted by a lease dated May 1, 1883, less the last ten days thereof, at a rent of 835*l*. By clause 4 of the sub-lease the lessees covenanted with the lessors in manner expressed in clauses 5 to 10 thereof, that is to say (by clause 5) to pay rent; (by clause 6) to pay outgoings of every description; (by clause 7) to keep and deliver up in repair; (by clause 8) to allow the lessors to enter and view the condition of the premises and to make good any defects that might be ascertained; (by clause 9) that "The lessees will not at any time during the said term assign or sublet the said demised premises or any part thereof, or use the same as an inn, beerhouse, or spirit shop, or for the retail sale of any intoxicating liquor, nor shall any gunpowder, petroleum, or other explosive thing be manufactured or stored on any part of the said demised premises"; and (by clause 10) to allow the lessors to enter on the premises and perform any covenants in the superior lease which might be necessary to prevent a forfeiture. By clause 13 of the sub-lease it was provided that "the expression 'the lessors' used herein shall, where the context so admits, include, besides the said James Hall and Hilton Philipson, their respective executors, administrators and assigns; and the expression 'the lessees' used in these presents shall, where the context so admits, include, besides the said Sir Joseph Whitwell Pease, Baronet, M.P., and the said Sir Christopher Furness, Knight, their respective executors or administrators."

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On August 21, 1899, the lessees assigned their interest under the sub-lease to Robert Stephenson and Company, Limited. On this occasion a licence to assign was asked for by the lessees and given by the lessors. On February 19, 1900, the company sub-demised to trustees for debenture stock holders of that company; and on this occasion also a licence was asked for and obtained from the lessors. There was not, however, on either of these occasions, any similar licence granted by the freeholders under the original lease of May 1, 1883. For the purpose of curing this defect there was executed on February 1, 1900, a deed of release or waiver to which all persons interested, including the freeholders, were parties.

SARGANT J. By an order made in the action on July 9, 1909, a receiver  
1915 was appointed on behalf of the stockholders of certain assets of  
ROBERT the company, including the premises included in the sub-lease.  
STEPHENSON Palmer's Shipbuilding and Iron Company, Limited, in  
AND October, 1910, entered into a tenancy agreement with the  
COMPANY, receiver for a tenancy of two and a quarter years of the ship-  
LIMITED, yard, works, and docks belonging to Robert Stephenson and  
*In re.* Company, Limited, with an option of purchasing certain assets  
POOLE of the latter, including the premises comprised in the underlease,  
v. for a sum in cash, or, at the option of the company, a larger  
THE sum payable by the issue of debenture stock of a company to  
COMPANY. be incorporated under the Companies (Consolidation) Act, 1908.  
This agreement was sanctioned by the Court.

In September, 1912, the shipbuilding company gave notice exercising the option of purchasing for the larger sum, payable by the issue of debenture stock of a company incorporated in June, 1912, and called Palmer's Hebburn Company, Limited.

The completion of the sale was, however, delayed by reason of a question raised as regarded the proposed assignment of the residue of the term under the sub-lease to the Hebburn Company, the legal personal representatives of the lessors claiming that the Stephenson Company could not assign it without committing a breach of the covenant against assigning, while the Stephenson Company contended that the covenant did not affect them, but was limited to the original sub-lessees and their respective executors and administrators.

The owner of the reversion expectant on the determination of the sub-lease was willing to grant his licence to assign or sub-demise the premises to the Hebburn Company.

*Romer, K.C.*, and *G. M. Simmonds*, for the plaintiff. Palmer's Company has exercised the option to purchase, but the legal personal representatives of the company's immediate lessors, the persons who granted the sub-lease, are unwilling to give their unconditional assent to an assignment of the Stephenson Company's interest to the Hebburn Company. The covenant by the sub-lessees is that they will not at any time "assign or sublet" the demised property. That covenant does not and cannot run

with the land; it is prohibitive and not merely restrictive of assignment or sub-letting. It is true that in *Williams v. Earle* (1) it was held that a covenant not to assign without leave of the lessors, where the assigns of the lessee are mentioned, runs with the land, but Blackburn J., referring to *Bally v. Wells* (2), says that what the judges "seem to have meant is, that when the lessee covenants, not that he will not assign without licence, but that he will not assign at all, then the covenant of course does not run with the land, because the covenant is gone whether the assignment be with a licence or without." In the Opinions and Judgments of Wilmot C.J., pp. 351, 352, he says, in his account of *Bally v. Wells* (2): "The covenant, not to assign generally, must be quite personal and collateral; for it can only affect the lessee himself, and is so far from being meant to reach the assigns, that it is inserted to prevent there ever being any assigns at all: whereas this lease grants the tithes to the lessee, his executors, administrators, and assigns . . . and though I admit a covenant 'not to assign generally' is collateral, and collateral covenants, not relating to the thing demised, do not bind the assignee; yet no case has been cited, that a covenant for lessee and his assigns, not to assign to a 'particular person' would not bind him; and I think it would, for it falls within every rule laid down by Lord Coke in *Spencer's Case*." (3) Where a lease contained a covenant by the lessees (not expressed to be on behalf of their assigns) not to assign without the lessor's written consent, it was unnecessary to decide whether the covenant would have bound assigns though not named: *West v. Dobb*. (4) In the note to that case (4) it is stated that Blackburn J. "protested against the judgment in" *Williams v. Earle* (1) "being taken to have decided more than that the covenant ran with the land and bound the assignee, assigns being mentioned." A covenant that the lessee, his executors or administrators, will not assign does not bind his assignees: *Doe v. Smith* (5); *Paul v. Nurse* (6); *Goring v. Warner*. (7)

(1) (1868) L. R. 3 Q. B. 739, 750.

(2) (1769) 3 Wils. 25, 33.

(3) (1582) 5 Rep. 16a; 1 Sm. L. C., 11th ed. p. 55.

(4) (1869) L. R. 4 Q. B. 634, 637, n.

(5) (1814) 5 Taunt. 795.

(6) (1828) 8 B. &amp; C. 486.

(7) (1724) 2 Eq. C. Ab. 100.



SARGANT J. Even if the covenant would otherwise run with the land, this  
 1915 is not the case where the parties have indicated an intention  
 ROBERT that it shall not so run. Here such an intention is shown, first  
 STEPHENSON by the absolute prohibition of assignment, and secondly because  
 AND in the definitions in the sub-lease the word "lessees," as con-  
 COMPANY, trasted with the word "lessors," is not stated to include assigns.  
 LIMITED, [They also referred to *Whitchcot v. Fox* (1); *Philpot v.*  
*In re.* *Hoare* (2); *Roe v. Harrison* (3); *Seers v. Hind.* (4)]  
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*Percy F. Wheeler*, for Palmer's Shipbuilding and Iron Com-  
 pany, Limited, adopted the above argument, and referred to  
 Davidson's Conveyancing, 2nd ed. vol. v. pt. i. p. 179.

*E. D. Chetham-Strode*, for Palmer's Hebburn Company,  
 Limited.

*A. L. Ellis*, for the legal personal representatives of the  
 original lessees. The assigns are bound. If the plaintiff's  
 counsel's argument is sound, the assigns are not stopped  
 from running a beerhouse on the premises. In *Goldstein v.*  
*Sanders* (5) Eve J. said that on the balance of the authorities  
 a covenant not to assign without the consent of the lessor ran  
 with the land and bound the assigns although they were not  
 mentioned. [He also referred to *Spencer's Case* (6); *McEacharn*  
*v. Colton* (7); *White v. Southend Hotel Co.* (8)]

*Cur. adv. vult.*

March 23. SARGANT J. This summons, as amended, raises  
 the question whether the assignees of the leasehold interest  
 under an indenture of sub-lease, dated July 24, 1899, are entitled  
 to assign that interest without the licence or consent of their  
 underlessors for the time being. [His Lordship stated the facts  
 above set out, and also certain facts as to a deed of waiver to  
 which the original lessors were parties. After stating the argu-  
 ment as to this, which, he said, was not borne out by the terms  
 of the documents referred to, his Lordship continued:]

So far as the covenant against assignment is concerned, the

(1) (1616) Cro. Jac. 398.

ante, p. 549.

(2) (1741) 2 Atk. 219.

(6) 5 Rep. 16a; 1 Sm. L. C., 11th

(3) (1788) 2 T. R. 425.

ed. p. 55.

(4) (1791) 1 Ves. Jun. 294.

(7) [1902] A. C. 104.

(5) [1915] W. N. 55; now reported

(8) [1897] 1 Ch. 767.

rights of the lessors and lessees for the time being under the sub-lease have to be ascertained merely from the terms of the sub-lease itself.

Mr. Romer's argument was, as I understood it, first, that in general a covenant restricting assignment where the assigns of the lessee are not expressly mentioned does not run with the land; and, secondly, that, however this may be in general, the language of this sub-lease contained sufficient indications of intention that the covenant should be personal only, and not run with the land. As to the first point, *Williams v. Earle* (1) is, of course, an express and binding authority at the present day that a covenant restricting assignment, where the assigns of the lessee are expressly mentioned, does run with the land. And it would be necessary, therefore, for the success of Mr. Romer's first argument, to throw covenants restricting assignment into that very narrow class of covenants supposed to have been indicated by the first two rules in *Spencer's Case* (2), which just sufficiently touch the land to run with it if assigns are mentioned, but to fail to run with it if assigns are not mentioned. But the only covenants of that class mentioned in the first two rules in *Spencer's Case* (2) are covenants with regard to things not in esse at the time of the demise, such as buildings to be erected afterwards; and, since *Minshull v. Oakes* (3), this distinction itself must be considered as having been obliterated, as being unreasonable. Further, though the actual decision in *Williams v. Earle* (1) was only with regard to covenants restricting assignment in which assigns are mentioned, the reasoning of Blackburn J. deals with the broad question whether a covenant restricting assignment touches and concerns the land, and this reasoning is, therefore, applicable to either form of covenant. Certainly covenants restricting assignment touch and concern the land as much as covenants to reside on the premises (*Tatem v. Chaplin* (4)) or covenants to buy liquors from a particular firm (*White v. Southend Hotel Co.* (5)); and these covenants have been held to run with the land, although

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(1) L. R. 3 Q. B. 739.

(2) 5 Rep. 16a; 1 Sm. L. C., 11th ed. p. 55.

(3) (1858) 2 H. & N. 793.

(4) (1793) 2 H. Bl. 133.

(5) [1897] 1 Ch. 767.

SARGANT J. assigns were not expressly named. Further, in the recent case of *Goldstein v. Sanders* (1) Eve J. has expressed the view that on the balance of the authorities a covenant not to assign without the consent of the landlord runs with the land, and binds the assigns though not mentioned.

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But although covenants restricting assignment may in general be capable of running, and be construed as running, with the land, it will be otherwise if the parties indicate an intention that they should not so run. Here it is said that such an intention is indicated, first, because the covenant does not merely restrict but absolutely prohibits assignment, so that there can never have been in the contemplation of the parties any assignee to be bound; and, secondly, because in the definition in the sub-lease the word "lessees," as contrasted with the word "lessors," is not stated to include assigns. In support of the former of these two arguments *Whitcot v. Fox* (2) was cited. In that case, however, the covenant was to assign only to particular members of the original lessor's family, so that the covenant was obviously personal to the lessee himself and not applicable after he had assigned; and the case, therefore, is no authority here. And some general remarks of Wilmut C.J. in *Bally v. Wells* (3), at pp. 351, 352, of that learned judge's Opinions and Judgments, have, since the case of *Williams v. Earle* (4), less importance than otherwise would be attached to them.

I have, therefore, to decide this matter on my view of the meaning of the sub-lease. And here it seems to me that the indications above mentioned against the covenant running with the land are entirely outweighed by other considerations. The sub-lease was for a period of some seventy-two years; and the special language from which it is sought to show that the covenant against assignment did not run with the land applies equally to all the other covenants in the sub-lease, such as those to pay rent, to pay outgoings, to repair, to allow entry, and so on. It is inconceivable that under such circumstances the parties intended that there should never be any assignment or underleasing at all during the whole of the seventy-two years; or that in case of

(1) Ante, p. 549.

(2) Cro. Jac. 398.

(3) 3 Wils. 25, 33.

(4) L. R. 3 Q. B. 739.

assignment the assignee should be free from the whole of the SARGANT J. obligations of the lease, unless he undertook them de novo. No doubt it was contemplated that the lessees would from time to time apply to the lessors to waive the prohibition against assignment, and that thus the same results would follow as if the more usual form had been used which merely prohibits assignments without consent; and, no doubt also, the word "assigns" was omitted from the definition of "lessees" in the lease in view of this prohibition, and on the same ground on which the phrase "permitted assigns" is sometimes introduced into such clauses, namely, a not unnatural but unfounded apprehension that the recognition of the possibility of there being assigns might be held to be inconsistent with the prohibition or restriction of assignment.

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In my judgment, therefore, there is not enough in the special language of the sub-lease to negative what I have found to be the general presumption, namely, that a covenant restricting assignment runs with the land; and I declare that the lessees are not entitled to assign or sub-let without the consent of their lessors.

Solicitors for plaintiff: *Slaughter & May.*

Solicitors for other parties: *Rawle, Johnstone & Co., for Cooper & Goodger, Newcastle-upon-Tyne; Roney & Co.*

F. E.



ASTBURY J.

*In re* HEWETT'S SETTLEMENT.

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April 13, 14.

[1914 H. 2018.]

*Perpetuity—Marriage Settlement—Limitations too remote—Gift over of Life Interests to Persons in esse.*

A gift over of life interests in personal property to persons in esse at the date of the settlement, if dependent on the failure of limitations that are too remote, is itself void for perpetuity.

*In re Thatcher's Trusts* (1859) 26 Beav. 365 followed.

*In re Norton* [1911] 2 Ch. 27 explained.

#### ORIGINATING SUMMONS.

By an ante-nuptial settlement dated January 30, 1893, and made between the husband of the first part, the wife of the second part, and trustees of the third part, certain personal property belonging to the husband was assigned to the trustees in trust to pay the income to the husband for life and after his death to the wife for life. In the event of the husband's bankruptcy or alienation of the income his life interest ceased and the income was payable to the wife for life, and after her death the husband took a protected life interest under a discretionary trust in favour of himself, his issue and other persons.

After the decease of the survivor of the husband and wife the trustees were to stand possessed of the property in trust for all the children of the marriage who being sons should attain the age of twenty-five or being daughters should attain that age or marry in equal shares.

And if there should be no child of the marriage who being a son should attain the age of twenty-five or being a daughter should attain that age or marry, then upon trust to pay the income in equal shares to the husband's three sisters Helga, Hilda, and Hulda for their lives and the life of the survivors or survivor of them for their separate use without power of anticipation.

And after the decease of the survivor upon trust to pay the income to the husband's brother Sir Harald George Hewett

for life if he should be then living. And from and after his decease upon trust to pay and transfer the property and income absolutely to such persons as he should by deed or will appoint. And if he should not be living at the death of the survivor of the three sisters, then upon trust to pay and transfer the property and income to his eldest son then living. And in default of appointment, or if there should be no such son then living, then upon trust absolutely for the person then entitled in succession to the baronetcy.

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The wife died on October 3, 1912, without issue. The husband had not become bankrupt or alienated the income, and his life interest was still subsisting.

On July 31, 1914, the husband issued this summons to determine inter alia whether the trusts after the decease of himself and his wife were void for perpetuity.

*Hon. Frank Russell, K.C.*, and *E. G. Rand*, for the husband. The limitation to the children who attain twenty-five or marry is clearly void, and the gift over if no child attains twenty-five or marries is equally void: *In re Abbott* (1); *Hancock v. Watson*. (2)

*J. G. Wood*, for the trustees.

*E. P. Hewitt, K.C.*, and *Dighton Pollock*, for Hilda. We admit that the gift to the children is void, but the gifts over must all vest, if at all, during the sisters' lives and are therefore good.

[ASTBURY J. You only represent Hilda and are not concerned with the subsequent interests. You had better confine your argument to the question whether the sisters' interests are valid.]

The sisters are only given life interests. These must vest, if at all, during their lives. The gift over is therefore good quoad those life interests: *Lewis on Perpetuity*, p. 661; *Gray on Perpetuities*, 2nd ed. p. 226; *Jarman on Wills*, 6th ed. p. 352.

The last two text-books were cited with apparent approval by *Joyce J.* in *In re Norton*. (3) In that case each of the testatrix's five children took a life interest under clause 3 of her will and a daughter's husband possibly unborn at the testatrix's death took

(1) [1893] 1 Ch. 54, 57.

(2) [1902] A. C. 14, 17.

(3) [1911] 2 Ch. 27, 37.

ASTBURY J. a life interest under clause 4. Clause 5 gave the daughter a power of appointment by deed or will among her children or issue, contingent on there being children or issue living at the death of herself and her husband; and in default of appointment the share was given by clause 7 to a class of children and issue "then living," their interests vesting at twenty-one. This last limitation was clearly void. By clause 8 if a daughter died without leaving issue who attained twenty-one, then from and after the death of the daughter and her husband the share was given to the survivors of the testatrix's sons and daughters then living for their lives. By clause 9 the corpus of the share was given over to a class of children and issue ascertainable at the death of the survivor of the sons or daughters and their husbands, which was obviously void.

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Now a daughter, Elizabeth Norton, died without issue, and although clause 8 was in effect dependent on the failure of the invalid limitation in clause 7, Joyce J. held that the gift over of her share to the survivors of the sons and daughters for their lives was good. (1)

Another daughter, Fanny Carter, widow, had purported to appoint her share to her nine adult children absolutely. But this power only took effect on the contingency of her leaving issue living at the death of herself and a future husband possibly born after the testatrix's death, so that reading the absolute appointment into the will, it was void. But Joyce J. evidently thought that the widow might appoint life interests to her nine children, as these must vest, if at all, within the proper period. (2)

If the beneficial interest is so given that it must vest, if at all, within the proper period, the gift is good, although the event on which the gift is made is by itself too remote: *Lachlan v. Reynolds*. (3)

The only actual decision to the contrary on this particular point is *In re Thatcher's Trusts*. (4) But that case was based on a misconception of *Beard v. Westcott* (5) and *Monypenny v.*

(1) [1911] 2 Ch. 33, 34.

(3) (1852) 9 Hare, 796.

(2) [1911] 2 Ch. 40.

(4) 26 Beav. 365.

(5) (1822) 5 B. & Al. 801; T. & R. 25.

*Dering*. (1) Now *Beard v. Westcott* (2), like *Somerville v. Lethbridge* (3), was an attempt to create an unbarrable entail by limiting successive life interests to unborn children and their issue. That failed under the old rule against perpetuity, namely, that you cannot give an estate to an unborn son for life followed by any remainder to his issue. It has nothing whatever to do with the modern rule against perpetuity, and the same remark applies to *Monypenny v. Dering*. (1) In *In re Thatcher's Trusts* (4) Romilly M.R. merely followed these decisions without perceiving that they were wholly irrelevant to the question before him, which, like the present case, depended on an entirely different rule, namely, the modern rule against perpetuity. In these circumstances *In re Thatcher's Trusts* (4) cannot be considered a binding authority.

*Hon. Frank Russell, K.C.*, in reply. In the present case the gift over is on the happening of an event that is clearly too remote. The event is quite definite, and it cannot be modified by reference to the beneficial interests. *In re Thatcher's Trusts* (4), however subject to criticism the ratio decidendi may be, decides the exact point, and is a binding authority.

The argument on *In re Norton* (5) is based on a misapprehension. The decision is perfectly clear from beginning to end. Clause 8 was in no way dependent on the failure of clause 7. It was a new and entirely independent start in the limitations. The event on which it was to take effect did not include the husband's death, though the limitations to arise on the event were of course made subject to his life interest. The event was clearly good, and the limitations might quite well have given absolute interests to the surviving sons and daughters, after the death of the unborn husband, as they were all living at the testatrix's death. The actual gift was no doubt for their lives, but the first judgment (6) was in no way based on that fact. In clause 9 the husband's death was brought into the event, so the ultimate gift over of corpus was bad. In the second

(1) (1852) 2 D. M. &amp; G. 145.

(2) 5 B. &amp; Al. 801; T. &amp; R. 25.

(3) (1795) 6 T. R. 213.

(4) 26 Beav. 365.

(5) [1911] 2 Ch. 27.

(6) [1911] 2 Ch. 33.



ASTBURY J. judgment (1) the learned judge, though thinking that the life interest point would apparently be well arguable, left it entirely open.

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The semble in the head-note should really have been a *quaere*.

ASTBURY J. (after stating the facts and reading the settlement up to the gift over of the life interests to the three sisters). The question is whether the gift over to the three sisters for life in the event of there being no child of the marriage who being a son attains twenty-five or being a daughter attains that age or marries is or is not valid.

With the exception of one authority the authorities in this country seem to be all in one direction, but a considerable amount of criticism has been passed upon some of them in the text-books.

It is quite clear that a gift is void for remoteness unless it must of necessity take effect, if at all, within a life or lives in being, or twenty-one years afterwards. But the question whether a "life" interest given over, after an event which may infringe the rule, to persons living at the date of the settlement is good has been a question of controversy.

In an American law book, namely, Gray on Perpetuities, 2nd ed. p. 226 [3rd ed. p. 239], the late learned author says: "As all life interests to persons now in being must take effect, if at all, within lives in being, all such interests would seem to be good, although preceded by interests that are too remote." Then the learned author refers to the English authorities, and comes to the conclusion that a limitation for the life of a living person following an interest which is too remote ought to be held valid in America notwithstanding the decisions that he refers to.

In Jarman on Wills, 6th ed. p. 352, the learned editor says: "Mr. Gray remarks: 'As all life interests to persons now in being must take effect, if at all, within lives in being, all such interests would seem to be good, although preceded by interests that are too remote.' Mr. Gray's reasoning is unanswerable, so far as the general principle is concerned, but whether it would succeed if the question came before our Courts seems doubtful." Then the learned editor deals with the authorities,

(1) [1911] 2 Ch. 40.

and comes to the conclusion that the decision in *In re Thatcher's* ASTBURY J. *Trusts* (1) was erroneous.

Having regard to the state of the authorities, I do not propose to express my own opinion upon this point. The authorities bind me. I shall leave them as I find them, and if they are to be distinguished it must be done in another place.

It has been held many times that limitations following a limitation void for perpetuity are themselves void. See *Somerville v. Lethbridge* (2); *Beard v. Westcott* (3); *Monypenny v. Dering*. (4)

In *Beard v. Westcott* (3), where the will was practically in the same terms as in *Somerville v. Lethbridge* (2), there was a devise to A. for ninety-nine years if he should so long live, remainder to his first son, then unborn, for ninety-nine years, if he should so long live, and so on in tail male to such first son lawfully issuing for ever; and in default of such issue of such first son, to the second and other sons successively for ninety-nine years only, in case he should so long live, and that such elder son or the issue of such elder son should have no greater estate than for ninety-nine years, determinable at his decease; and if there should be no issue male of A. at the time of A.'s death, or in case there should be such issue male at that time, and they should all die before twenty-one without issue male, then to B. for ninety-nine years if he should so long live; remainder to the first son of B. for ninety-nine years if he should so long live, &c. It was held that A. took under the will an estate for ninety-nine years determinable with his life; and that upon his death his first son would take a similar estate; but that the limitations to the second and other unborn sons of A. were void as tending to perpetuity; and the limitations over to B. for ninety-nine years if he should so long live and the other remainders after these void limitations were not accelerated, but were void also. This case was so decided by Lord Eldon (3), following the decision of the Court of King's Bench (5), although the Court of Common Pleas (6) had expressed a contrary opinion.

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(1) 26 Beav. 365.

(2) 6 T. R. 213.

(3) T. &amp; R. 25.

(4) 2 D. M. &amp; G. 145.

(5) 5 B. &amp; Al. 801.

(6) (1813) 5 Taunt. 393.

ASTBURY J. In *Monypenny v. Dering* (1) Lord St. Leonards went very fully  
 1915 into these authorities in a case which was also a devise of real  
 HEWETT'S property, the devise, shortly, being to trustees upon trust to sell  
 SETTLE- and pay debts and subject thereto upon trust for P. M. for life,  
 MENT, and after his decease for his first son for life, and after his  
*In re,* decease for the first son of such first son and the heirs male of  
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 v. P. M. successively for the like interests and limitations, and in  
 ELDRIDGE. default of issue of the body of P. M. or in case of his not leaving  
 any at his decease for T. M. for life with remainders over. It  
 was held that the gift over to T. M. for life and the subsequent  
 remainders could be supported as an independent clause and not  
 as a remainder limited upon an event outside the proper period.  
 Lord St. Leonards, after referring to *Beard v. Westcott* (2),  
 said (3): "That Court"—the Court of King's Bench—"held that  
 the gift over was void, not because it was not within the line of  
 perpetuity, but expressly on the ground I have adverted to,  
 namely, that that limitation over was never intended by the  
 testator to take effect, unless the persons whom he intended to  
 take under the previous limitation would if they had been alive  
 been capable of enjoying the estate, and that he did not intend  
 that the estate should wait for persons to take in a given event,  
 where the person to take was actually in existence but could not  
 take; and Lord Eldon affirmed that decision." And then the  
 learned judge went on to explain how the particular gift before  
 him could be treated as a gift in the alternative.

In *In re Abbott* (4) Stirling J., dealing with a bequest of  
 personalty, said: "It is settled that any limitation depending or  
 expectant upon a prior limitation which is void for remoteness is  
 invalid. The reason appears to be that the persons entitled  
 under the subsequent limitation are not intended to take unless  
 and until the prior limitation is exhausted; and as the prior  
 limitation which is void for remoteness can never come into  
 operation, much less be exhausted, it is impossible to give effect  
 to the intentions of the settlor in favour of the beneficiaries

(1) 2 D. M. &amp; G. 145.

(3) 2 D. M. &amp; G. 182.

(2) 5 Taunt. 393; 5 B. & Al. 801;  
 T. & R. 25.

(4) [1893] 1 Ch. 54, 57.

under the subsequent limitation." For this proposition the learned judge referred to *Robinson v. Harcastle* (1), *Routledge v. Dornil* (2), *Beard v. Westcott* (3), and especially to the comments of Lord St. Leonards in *Monypenny v. Dering*. (4)

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In *Hancock v. Watson* (5), a case dealing with personalty, it was contended that the gift over could be split into two contingencies. Lord Davey referred to the opinion of Maule J., one of the judges who advised the House in *Lord Dungannon v. Smith* (6), and read the following passage: "With respect to this argument it may be observed that the words of the testator are clear and unambiguous. There is no difficulty in dealing with them as they stand in the will unless it be sought to evade the rule against perpetuity. There is no such rule of construction as that any words which point out the same course of devolution"—Lord Davey paused to add "or describe the same events"—"as those used by the testator may in construing a will be substituted for those which he has used, a proposition which seems to be assumed in the argument in question. Such a rule would be manifestly inconsistent with the established law that a gift to take effect on an event which may happen or may not happen within the legal limit is too remote, such a gift being always capable (consistently with the same order of devolution) of being divided into two gifts, one necessarily to take effect, if at all, within the legal time, and the other afterwards."

With the exception of *In re Thatcher's Trusts* (7) I have not been referred to any actual decision on the question whether a life interest given to a living person dependent upon an event which may transgress the rule is valid on the ground suggested by the text-books.

In *In re Thatcher's Trusts* (7), however, the exact point was decided by Romilly M.R. That was a bequest of a mixed fund to Elizabeth Hobbs for life, and afterwards to her children equally to be vested in such as should attain twenty-five, with a gift over if no child should attain twenty-five, as to one moiety

(1) (1788) 2 T. R. 241, 251.

(4) 2 D. M. & G. 145, 181, 182.

(2) (1794) 2 Ves. Jun. 357.

(5) [1902] A. C. 14, 20.

(3) 5 B. & AL. 801; T. & R. 25.

(6) (1846) 12 Cl. & F. 546, 579.

(7) 22 Beav. 365.



ASTBURY J. to William Hobbs, and as to the other moiety to Ann Tuckwell  
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for life with remainder to her children. The point as it affects this case was whether the gift over of such a life interest to a living person dependent upon an event which might transgress the rule as to perpetuities was valid or not. Romilly M.R. said (1): "Then arises the question, whether the gift over to Mrs. Tuckwell for life is good, this being a limitation to a person in existence at the date of the will. The distinctions on this subject are well defined, although they may not be in every case susceptible of a ready application to the particular words of a will. On the one hand, it is clearly settled, that if there be two alternative limitations, one branch of which is too remote, and the other of which is capable of taking effect, the Court will disregard the invalid limitation and give effect to that which is legal. *Longhead v. Phelps* (2) is an instance of this distinction, which rests on sound and settled rules of construction. On the other hand, if the limitations are ulterior to or expectant upon limitations which are too remote, they are void also, although made to a person in existence at the date of the will." For that the learned judge cited *Beard v. Westcott* (3) and *Monypenny v. Dering* (4), and after referring to the words of Lord St. Leonards in that case, he said (5): "This is strictly applicable to the present case; it is impossible here to say that the limitation to Mrs. Tuckwell is an alternative limitation; it is clearly one expectant upon the failure of the previous limitation to the children." He then declared that the gifts over of the share in question, including the life interest of Mrs. Tuckwell, were void. That is a definite decision on the exact point I have to decide here, and unless it has been dissented from or overruled it seems to me it is my duty to follow it.

With the exception of the passages from the text-books the only decision I have been referred to since this date upon this point is that of Joyce J. in *In re Norton*. (6) This arose on a will which was extremely difficult to construe, and the learned judge decided (inter alia) two points, one as to a gift over of a

(1) 26 Beav. 369.

(4) 2 D. M. &amp; G. 145.

(2) (1770) 2 W. Bl. 704.

(5) 26 Beav. 370.

(3) 5 B. &amp; Al. 801.

(6) [1911] 2 Ch. 27.

life interest under clause 8; the other as to the validity of a power of appointment over the corpus of the estate under clause 5. The testatrix gave her real and personal estate to trustees upon trust for sale and investment and upon trust (clause 3) to pay the income to certain named sons and daughters during their lives and (clause 4) from and after the death of each of her daughters leaving a husband unto the husband for his life, which, of course, involved the possible infraction of the rule in the case of the gifts over in clauses 5, 7, and 9; and (clause 5) from and after the decease of each of his sons and of the survivor of each of his daughters and her husband leaving children or more remote issue living at the time of such death in trust for such of his or her children or more remote issue as he or she should by deed or will appoint, and (clause 6) in default of appointment (clause 7) in trust for his or her children "then living" and the issue "then living" of any child then dead, the issue taking the share that the parent would have taken, and the interests to vest at twenty-one. This limitation to a class to be ascertained at the death of a possibly unborn husband was of course void.

Clause 8, upon which the first point was decided, provided that "In case any of my said sons and daughters shall depart this life without leaving lawful issue or leaving such all of whom shall happen to die under the age of twenty-one years"—which was a compound event the whole of which must happen within the legal period—"then I declare that from the death of each of my sons who shall so die or whose issue shall so fail or from the failure of his issue which shall last happen and from the death of the survivor of each of my daughters so dying or whose issue shall so fail and any husband with whom she has now or may hereafter have intermarried or from the failure of her issue after the death of such survivor," then the trustees were to stand possessed of the share of the child so dying upon trust to pay the interest and dividends of such share unto and equally amongst the survivors of the testatrix's sons and daughters for their lives and the life of the survivor. Clause 9 created an ultimate gift over of the corpus "on the death of the last survivor of my said sons or daughters and the husbands of my

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ASTBURY J. daughters " to a class of children and issue " then living " which  
1915 was clearly void.

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Now although the testatrix in the middle of clause 8 referred to what was to happen after the death of the survivor of the daughter and her husband, the actual event upon which the vested interests in remainder were to arise seems to me to have been an event which must occur within the proper period, and the true construction of this clause probably was that on the happening of such an event, which was a valid and proper event, then, subject to any prior life interest to the husband which was given in clause 4, the trustees were to hold the estate upon trust for the survivors for life. On that clause a question arose on the deaths of a daughter, Elizabeth Norton, and her husband without issue, namely, whether the life interest to the survivors was or was not valid. Joyce J. held that it was valid. He said (1): "In clause 8 the limitation in case any daughter shall die without leaving issue is a separate, or may be taken as a separate, and substantive limitation which must take effect, if at all, within the life in being at the time of the testatrix's death and so it is not void for remoteness." Then the learned judge held that the limitation after the death of any daughter dying without issue or after the death of the survivor of such daughter and her husband, whenever born, to the survivors of the testatrix's sons and daughters during their lives was unobjectionable, "since they were all living at the death of the testatrix." The learned judge then discussed whether the sentence could be split into two separate alternative limitations and came to the conclusion that it could not, but added (1): "I do not see what real difference it would make if such splitting up were allowed, because the limitation after the death of the survivor of the daughter who dies without issue and any husband of hers to the surviving sons and daughters for life is good." Then he held, in fact, that the gift over of income to the survivors under clause 8 was a valid gift. He also held that the gift over of the corpus of this share under clause 9 was clearly bad. In the case of another daughter, Mary Ann Illingworth, who had died intestate and without appointing, leaving a

(1) [1911] 2 Ch. 33.

husband and four adult children, he held that there was no valid disposition of the corpus under the gift in default of appointment (clause 7) which was clearly void. ASTBURY J.

Another daughter, Fanny Carter, widow, had nine adult children to whom she had appointed in equal shares, reserving a life interest. Joyce J. held, as in *Mary Ann Illingworth's* case, that the gift to the children in default of appointment was bad, but directed the question as to the validity of the power in clause 5 to stand over for further argument. The case was then argued on that point. In his judgment on the particular point Joyce J. said (1): "The question which, as I understand it, the plaintiffs are asking . . . is whether the power . . . is capable of being validly exercised. A bequest or devise is void for remoteness unless it must of necessity take effect, if at all, within a life or lives in being at the testator's death and twenty-one years after; and this is so none the less, although the legatee or devisee be an ascertained person living at the testator's death, if what is given to him be an absolute transmissible interest. If, however, what is given were, for example, only a life interest, the bequest or devise would obviously take effect, if at all, within a life in being at the testator's death: see *Gray on Perpetuities*, 2nd ed. § 252, p. 226, and *Jarman on Wills*, 6th ed. vol. i. p. 352." Later on the learned judge said (2): "A bequest of an absolute and transmissible interest upon a contingency which may possibly not happen within the period allowed by the rule, though to named persons, who were in existence at the death of the testator or testatrix, is void for remoteness: see *Jarman on Wills*, 6th ed. vol. i. p. 305," the result being that the actual limitations created by the will and Mrs. Carter's appointment were bad. He then proceeded to discuss the question whether a gift over of a life interest as distinct from an absolute interest to a person living at the death of the testatrix would or would not be good, and said (2): "For instance, suppose she" — i.e., Mrs. Carter—"were to appoint to children (or even remoter issue in existence at her death), limiting to them not absolute but only life interests in what I may call her share, those life interests would of necessity vest, if at all, within the limit of the period

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(1) [1911] 2 Ch. 37.

(2) [1911] 2 Ch. 40.

ASTBURY J. allowed by the rule. What the effect would be of her appointing interests to her children which, by the very terms of their creation, must vest and take effect, if at all, within the limit allowed by the rule I am not prepared to say, but apparently it would be well arguable that the interests created by such an appointment would be good." So that I think it is quite plain that in his second judgment the learned judge did not consider he had decided that point in his first judgment otherwise than on the construction of clause 8.

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Giving this decision the best consideration I can, I do not find any definite decision by the learned judge, nor am I clear that I find any dicta by the learned judge to the effect that the rule laid down in these earlier cases as applied in the case of *In re Thatcher's Trusts* (1) to a life interest was other than sound; at all events it is not, in my opinion, a decision clearly disagreeing with the decision in *In re Thatcher's Trusts* (1), which under the circumstances is binding upon me; therefore, it is not necessary for me to express my own personal opinion upon it.

The gift over is therefore void.

Solicitors: *Bird & Eldridges; Warren, Murton & Miller.*

(1) 26 Beav. 365.

G. R. A.

BRITISH THOMSON-HOUSTON COMPANY, LIMITED
v. DURAM, LIMITED.

[1913 B. 3391.]

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Patent—Practice—Action for Infringement—Defence—Plea of Manufacture mainly outside United Kingdom—Discovery of Documents—Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 25, sub-s. 2 (b); s. 27—Rules of the Supreme Court, 1883, Order XXXI, r. 12.

Where in an action for infringement of letters patent the defendant by his defence denies the validity of the patent and also pleads manufacture mainly outside the United Kingdom under s. 25, sub-s. 2 (b), of the Patents and Designs Act, 1907, and by his defence and particulars of objection clearly defines the issues:—

Held by Neville J., that the defendant was entitled, without proving a *prima facie* case, to the usual order for discovery of documents from the plaintiff.

Held by the Court of Appeal that as regards the plaintiffs' cause of action for infringement of the patent the order was rightly made, but that as regards the cause of action pleaded by the defendant under s. 25, sub-s. 2 (b), of the Patents and Designs Act, 1907, the discovery must be limited to documents showing the imports from persons named in the defence and documents showing the amount of manufacture by the plaintiffs.

ADJOURNED SUMMONS.

This was an application by the defendants for discovery of documents under these circumstances.

The plaintiffs by their statement of claim alleged that they were the legal owners of letters patent No. 21,513* of 1906 for an invention of a process and apparatus for the manufacture of electric lamp filaments, that the defendants had infringed their letters patent in manner appearing in the particulars of breaches delivered therewith, and they claimed an injunction and the usual ancillary relief.

The defendants by their amended defence denied all the plaintiffs' allegations, alleged that the letters patent were invalid for the reasons appearing in the particulars of objections delivered therewith, and also pleaded (paragraph 5): "The defendants will (under s. 25, sub-s. 2 (b), of the Patents and Designs Act, 1907) rely as a defence upon the fact that all the processes and manufactures described and claimed in the specification

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filed on the application for the letters patent No. 21,513* of 1906 sued upon are and have since the date of the said letters patent been carried on mainly outside the United Kingdom, that is to say, by"—and then followed the names and addresses of seven companies in America, Germany, and Holland. Under an order of the Court the defendants amended their particulars of objections by stating the proportion of wire manufactured according to the patented process in the United Kingdom since the beginning of the year 1912 to that manufactured abroad, and also the proportion manufactured in the United Kingdom to that used in the United Kingdom during the same period, and also stated that prior to March, 1911, the patented process as applied to wire was carried on entirely abroad. The defendants then took out a summons for discovery of documents by the plaintiffs.

The summons was heard before Neville J. on November 27, 1914.

H. Terrell, K.C., and Courtney Terrell, for the summons. No exception has been taken to the amended particulars of objection we have delivered under the order of the Court, and we are entitled to assume that they are accepted. We now ask for discovery of documents, and the onus is on the plaintiffs to show why the usual order should not be made.

A. J. Walter, K.C., and J. Hunter Gray, for the plaintiffs. In proceedings in the Patent Office before the comptroller under s. 27 of the Act for the revocation of a patent on the ground that the patented article or process is manufactured or carried on outside the United Kingdom the applicant has to make out a *prima facie* case before he is entitled to discovery. The practice was settled by Parker J. in *In re Hatschek's Patents* (1), where the applicant was directed to verify his particulars by statutory declaration. His Lordship pointed out the hardship on a patentee who might otherwise be compelled to disclose on oath the particulars of his business and the extent to which the patented article was manufactured in this country. The same objection to a patent can now by s. 25 of the Act be raised by a defendant to an action for infringement. This defence is new, and it is submitted that the procedure before the comptroller should be followed. The Court

(1) [1909] 2 Ch. 68, 93; 26 Rep. Pat. Cas. 228, 245.

in the exercise of its discretion under Order xxxi., r. 12, can require the particulars to be verified by affidavit. Admitting that discovery may have to be given at some future time, it is submitted that in this action the time for discovery has not arrived. The plaintiffs do no business abroad at all. The defendants allege manufacture abroad. Any person can obtain from a commercial directory a list of firms abroad who manufacture electric lamps, and the defendant, in such an action as this, is not entitled by setting out such a list in his particulars to a roving examination of the trade books of the plaintiff's business in the United Kingdom. There is no direct authority on the point, but in *Thermos, Ltd. v. Isola, Ltd.* (1) an application for particulars, and in *Vidal Dyes Syndicate, Ltd. v. Read Holliday & Sons, Ltd.* (2) leave to interrogate, was refused. In both cases the same defence under s. 25 was raised. It is submitted that the defendants are not entitled to the order until a prima facie case is made out.

H. Terrell, K.C., in reply. It is submitted that the procedure under s. 27 does not apply. In *Thermos, Ltd. v. Isola, Ltd.* (1) the issues were not defined. Here we have in our particulars raised clear and definite views. In *Vidal Dyes Syndicate, Ltd. v. Read Holliday & Sons, Ltd.* (2) the interrogatories were held to be fishing and oppressive.

NEVILLE J. I think that the procedure before the comptroller does not throw much light upon the question I have to decide, because there the question really is on whom lies the burden of proof, and according to the procedure now adopted the person who wishes to get rid of the patent is not entitled to put the patentee upon his defence without having first made out a prima facie case. But that does not help me, because in this case by the provisions of the Legislature this ground for revocation of the patent can be raised as a defence to an action, and that means that the allegation has to be proved at the trial of the action. There is no method known to a defendant or to a plaintiff prior to the trial of the action by which he can give prima facie evidence of the truth of his case. What

(1) (1910) 27 Rep. Pat. Cas. 195, 198. (2) (1911) 28 Rep. Pat. Cas. 323.

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is said about discovery in the judgment in *In re Hatschek's Patents* (1) applies to all discovery, that is to say, it is always hard upon a litigant, who in the end turns out to be right, that an investigation into his affairs, which as is ultimately proved his opponent has no right to have at all, was obtained by means of litigation. That seems to me to go to the root of discovery. It is an inconvenience to which you must submit if you are to have discovery at all, and the practice of the Court is to allow discovery in order to enable the litigants to do full justice to their case when the time for trial arrives.

The only case which seems to me to throw any light on the question is *Thermos, Ltd. v. Isola, Ltd.* (2), where in a similar action to the present the same defence was raised and an application for discovery and for leave to administer interrogatories was refused. I think, however, that what the Court of Appeal decided there was that until the issues in the action were defined no discovery could be had, but they certainly looked forward to a different state of things existing after the issues had been defined. I think that here the issues have been defined, and if I were to refuse discovery of documents in this case it seems to me that I must refuse in all cases where this particular matter is raised by way of defence to an action by a patentee, and in the absence of any authority or any provisions of the Legislature to that effect I do not think I should be justified in so doing. I hold, therefore, that in this case the order for discovery ought to be made.

Leave to appeal was granted.

H. L. F.

C. A. The plaintiffs appealed. The appeal was heard on February 4, 1915.

A. J. Walter, K.C., and *J. Hunter Gray*, for the plaintiffs.

H. Terrell, K.C. (*Courtney Terrell* with him), for the defendants, agreed that, so far as regarded the cause of action contained in the defence, the discovery should be limited to the quantity of

(1) [1909] 2 Ch. 68, 93; 26 Rep. Pat. Cas. 228, 245. (2) 27 Rep. Pat. Cas. 195.

goods imported into this country by the companies named in the defence.

In all other respects the arguments were the same as in the Court below.

BUCKLEY L.J. The plaintiffs sue for the infringement of two letters patent. The defendants deny the infringement, and in paragraph 5 of their defence say that they "will (under s. 25, sub-s. 2 (b), of the Patents and Designs Act, 1907) rely as a defence upon the fact that all the processes and manufactures described and claimed in the specification filed on the application for the letters patent No. 21,513* of 1906 sued upon are and have since the date of the said letters patent been carried on mainly outside the United Kingdom, that is to say, by" and then they go on to name the countries in which and the companies by which the manufactures have been carried on. An application for discovery of documents has been made by the defendants and an order for general discovery has been made by Neville J. The plaintiffs appeal against that order. There are two distinct matters in question in the appeal—first, the question of infringement, and, secondly, the question raised by paragraph 5 of the defence, on which the defendants may succeed notwithstanding the validity of the patent. The latter is pleaded under s. 25, sub-s. 2 (b), of the Act of 1907, which provides that "every ground on which a patent may be revoked under this Act either by the comptroller or as an alternative to the grant of a compulsory licence shall be available by way of defence to an action of infringement and shall also be a ground of revocation under this section." And s. 27 provides that "at any time not less than four years after the date of a patent, and not less than one year after the passing of this Act, any person may apply to the comptroller for the revocation of the patent on the ground that the patented article or process is manufactured or carried on exclusively or mainly outside the United Kingdom." Reliance was placed on this section also by the defendants in their defence. It is not disputed that a general order for discovery is right as regards the action for infringement; it is difficult to say what is the right order as regards the other part of the action. Paragraph 5

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of the defence stands to a large extent in the place of a counter-claim; it is in effect an action claiming that the defendants, notwithstanding their infringement of the plaintiffs' patent, are entitled to judgment in their favour. What the defendants are entitled to is a discovery of matters relevant to the matters pleaded in paragraph 5. It is suggested that we should not entertain the application for discovery now, but postpone it until the infringement action is tried; but that would be an inconvenient course to adopt, for it might render an adjournment of the trial necessary; we ought to decide to give discovery now of what is relevant. The defence has pleaded that the processes and manufactures have been mainly carried on in the places and by the persons or companies named; let there be discovery of documents showing the imports from the persons or companies named in paragraph 5 and the amount of manufacture by the plaintiffs.

PICKFORD L.J. I agree. The only valid objection to discovery at this stage would be that it was oppressive; and the order we are making does not lend itself to that criticism.

Order varied.

Solicitors: *Dunderdale, Dehn & Co.; Bristows, Cooke & Carpmael.*

W. J. B.

In re SWAN.WITHAM *v.* SWAN.

[1913 S. 702.]

SARGANT J.

1915

Feb. 18, 19,
23.

Will—Chattels—Legal Limitations to Life Tenant and Remainderman—Death of Tenant for Life—Chattels lost or injured—Claim for Compensation by Remainderman—Tort—“Actio personalis moritur cum persona”—Trustee or Bailee—Liability of Estate of Tenant for Life.

Testatrix specifically bequeathed her jewellery and lace to her daughter, with remainder in the event (which happened) of her daughter dying childless to testatrix's son, and appointed them her executor and executrix. On the testatrix's death in 1895 the daughter took possession of the jewellery and lace. She died in 1913, when some of the articles were found to have been broken up by her and others were missing. The son made a claim for compensation out of the daughter's estate, which her executor resisted on the ground that the claim was based on tort and merely personal:—

Held, that as possessor of the articles the daughter was in the position of trustee or bailee for the remainderman, and he was therefore entitled to recover by way of compensation out of her estate the amount necessary to restore or replace the articles.

The suggestion relating to chattels settled by way of legal limitations in *Fearne on Contingent Remainders*, 10th ed. vol. i. p. 414, namely, that on the executor's assent to the possession of the first taker the latter may “be considered as taking it in trust for the ulterior legatees, subject to his own anterior beneficial interest therein,” approved and adopted.

ADJOURNED SUMMONS WITH WITNESSES.

Emily Ann Swan, who died on December 25, 1895, by her will, dated August 29, 1895, made the following bequest: “I bequeath all my watches, diamonds, jewels, ornaments of the person, pictures and lace to my dear daughter, Florence Julia Swan, with remainder in the event of her dying childless or entering a convent to my son, Francis Edward Lister Swan, and the heirs of his body lawfully begotten, but on no account are they to be sold,” and the testatrix appointed her said son and daughter to be her executor and executrix.

On the mother's death, the daughter, who was living in the same

SARGANT J. house with her at Pau, took possession of her jewellery and lace without giving any inventory to the son.

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The daughter died childless on February 13, 1913, and her estate was now being administered by the Court.

This was a claim in the administration made by the son for compensation out of the daughter's estate in respect of certain articles of jewellery and lace comprised in the above bequest alleged to have been altered or lost by the daughter in her lifetime. The articles in question were (1.) a Brazilian diamond necklace forming a tiara which had come to the testatrix Emily Ann Swan from her mother, and which Florence Julia Swan had broken up and partly converted into other ornaments; (2.) two diamond safety pin brooches; (3.) a blue enamelled bracelet; and (4.) a Brussels lace wedding veil.

The executor of Florence Julia Swan resisted the claim.

Romer, K.C., and *W. F. Swords*, for the applicant. The question of the rights inter se of parties entitled to successive legal interests in chattels is discussed in *Fearne on Contingent Remainders*, 10th ed. vol. i. p. 414. Different views have been suggested—that the property remains in the executors; that the legal property is in the remaindermen: see *Hyde v. Parrat* (1) and *Randall v. Russell* (2); and that the first taker is the absolute owner, the remainderman having a spes successionis with a right to resort to a Court of Equity for the protection of the property. Whatever be the true theory of the matter, it is submitted that the Court in the exercise of its function of executing right and justice will carry out the intention of the testatrix in creating successive interests in the property and give relief in respect of the lost articles. Whether or not an action will lie at law against the representatives of the tenant for life, a Court of Equity will interfere to protect the interest of the remainderman, just as it interfered by giving relief in respect of equitable waste. Miss Swan was really in the position of a constructive trustee of the property, and her estate is liable to the remainderman for the damage sustained by her default; and her representatives cannot set up her tort as a defence. [They

(1) (1695) 1 P. Wms. 1.

(2) (1817) 3 Mer. 190, 195.

referred to Lewin on Trusts, 12th ed. p. 212.] The proper measure of damages is the amount necessary to restore or replace the articles into their former condition.

A. Grant, K.C., and *C. Hartree*, for the executor of Miss Swan. Miss Swan had an interest for life in the property and this was a legal interest of which she could have disposed. At common law executors could not be sued for a wrong committed by their testator for which only unliquidated damages could be recovered: see Carson's Real Property Statutes, 2nd ed. pp. 209, 210; *Phillips v. Homfray*. (1) The Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 2, gave a right of action against the executors in respect of injuries to property committed by their testator within six months before his death if proceedings were commenced within six months after his representatives entered on their office, but otherwise the common law inability to sue remains, and it is not suggested that the statute applies to the present case. The property now in question is not in existence, according to the claimant's own evidence, and restitutio in integrum is therefore impossible. The equitable right of a remainderman in regard to settled chattels appears to be to require the tenant for life to give security—which is only justified where danger exists: *Conduitt v. Soane* (2)—or to require an inventory to be signed by the tenant for life: *Slanning v. Style*. (3) Apart from an undertaking the tenant for life is under no contractual obligation. There is no authority for such a claim as the present. The tenant for life cannot have been a constructive trustee of the property since she had both the legal and the equitable property in the chattels: *Foley v. Burnell*. (4) It is not like the case of an attorney entrusted with a deed by a client, who cannot set up against his client that he has lost the deed: *Reeve v. Palmer*. (5) Whatever rights the claimant had were against Miss Swan herself and died with her. For the present purpose there is a vital distinction between the case of a legal limitation to successive persons, as in the present will, and the case of a legal limitation to trustees in trust for

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(1) (1883) 24 Ch. D. 439.

(2) (1844) 1 Coll. 285.

(3) (1734) 3 P. Wms. 334, 336.

(4) (1783) 1 Bro. C. C. 274; (1789)
4 Bro. P. C. 34.

(5) (1858) 5 C. B. (N.S.) 84.

SARGANT J. successive persons. In the first case the maxim *actio personalis moritur cum persona* applies to such a claim as the present. The views suggested in *Fearne on Contingent Remainders*, 10th ed. vol. i. p. 414, that the first taker may be considered as acquiring only a right to the use or occupation, or may be considered as taking in trust for the ulterior legatees, are unsound, and the first of these suggestions is inconsistent with the decision of the House of Lords in *Foley v. Burnell* (1); nor will the Court imply a trust affecting the possession. In *re Parry and Hopkin* (2) shows that the estate of the tenant for life of leasehold property is not liable to the remainderman for permissive waste, and *In re Cartwright* (3) is a similar decision as to freehold estate. The assent of an executor to a life estate is an assent to a bequest in remainder: *Stevenson v. Liverpool Corporation*. (4)

With regard to the measure of damages, if any, the lost property in the present case will not be presumed to have been of the best description on the principle of *Armory v. Delamirie*. (5) The claimant will only be entitled to the selling as opposed to the buying value of the property; or at the most to the middle price between the selling price and the amount which he would require to replace the property: *Jones v. Gooday* (6); *Mayne on Damages*, 8th ed. p. 466. [They also referred to *Catchmay v. Nicholls* (7), *Shirley v. Ferrers* (8), and *Hoare v. Parker*. (9)]

W. F. Swords in reply referred in addition to *Phipps v. New Claridge's Hotel* (10); Y. B. (1459), 37 Hen. 6, 30, cited in *Paramour v. Yardley*. (11)

SARGANT J. This is a claim in the administration of the estate of Florence Julia Swan by her brother, Francis Edward Lister Swan, to recover the value of certain articles of jewellery and lace which in the events which happened were left by the

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| (1) 4 Bro. P. C. 34. | (6) (1841) 8 M. & W. 146. |
| (2) [1900] 1 Ch. 160. | (7) (1674) 1 P. Wms. 6, n. |
| (3) (1889) 41 Ch. D. 532. | (8) (1690) 1 P. Wms. 6, n. |
| (4) (1874) L. R. 10 Q. B. 81. | (9) (1788) 2 T. R. 376. |
| (5) (1721) 1 Str. 504; 1 Sm. L. C., 11th ed. p. 356. | (10) (1905) 22 Times L. R. 49. |
| | (11) (1578) Plowd. 539, 542a. |

will of their mother to the sister for life with remainder to SARGANT J. the brother. [His Lordship read the bequest and stated the facts above set out and continued:] I should have thought it fairly clear that, those articles having been in the possession of this lady as tenant for life and not being forthcoming at her death, her estate was liable to make good their value to her brother, especially in view of the fact that it is shown that the absence of the Brazilian diamond necklace is due to a considerable extent at any rate to the lady having broken it up in her lifetime and converted parts of it into other ornaments. But a most elaborate argument has been addressed to me on the subject and I must deal with the argument so advanced.

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Practically the defence to the claim is put in this way. It is said that by virtue of the mother's will a series of legal limitations is created, a legal limitation to the daughter for life followed by a legal limitation in remainder to her brother, and that that being so and the estates being purely legal this is a claim for a tort committed by the daughter during her life, and that on the principle "*actio personalis moritur cum persona*" no effectual claim can be maintained against the daughter's estate in respect of that tort. The subject whether limitations can be created in personal property is one that has been very much debated, and the law with regard to it was not settled for very many years. There were various theories with regard to the matter, the difficulty of course lying in the fact that personal property does not admit of the creation of estates similar to those which are created in land. The first suggestion was that the property might remain in the executors. The second suggestion was that the first taker might be a usufructuary only and that the remainderman was the owner. That was held to be so at first only in cases where the use as distinguished from the article itself was given to the first taker for life, but ultimately that distinction was abolished. The third theory was that the first taker might be the absolute owner with an executory gift over; and the fourth theory was that the first taker might be in the position of a trustee either with regard to the property which he had in the

SARGANT J. article, or at any rate with regard to the possession which he had of it.

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The whole matter is discussed in Fearn on Contingent Remainders, where, after dealing with a large number of cases, the learned author in vol. i. pp. 413, 414, says this: "In such cases, if the first taker does not acquire the whole legal interest, upon the delivery from the executors, where is the obstacle to considering him as acquiring only a right to the use or occupation, according to the limited duration of his interest therein; and that the executor should retain the absolute property in trust for him and the legatees over; so as to preserve the right of such ulterior legatees to the possession, when their interests are to commence? Or if the whole legal interest be acquired from the executors, on their assent to the possession of the first taker; why may not he be considered as taking it in trust for the ulterior legatees, subject to his own anterior beneficial interest therein?" With regard to the first of those alternative suggestions, it appears to me that that suggestion has probably been disposed of by the case of *Foley v. Burnell* (1) in the House of Lords, the decision in which appears to be incompatible or at least inconsistent with the notion of the ultimate remaindermen taking anything short of some definite legal interest under the will. But I am prepared to adopt the second suggestion, with perhaps some slight modification, and to hold that either as to the property or preferably perhaps as to his possession of the property the first taker is during his life a trustee or a quasi-trustee for the remaindermen.

The present case is really simplified by the circumstance that not only was this lady the first tenant for life, but she was also co-executrix of the will with her brother, and, if it were the fact, as counsel suggested, that there is no obligation by contract binding on the first person who takes possession unless he gives some express undertaking analogous to a contract, it seems to me that in the present case this lady could not derive any advantage from her own omission in transferring the articles from herself as executrix to herself as tenant for life without taking a proper undertaking so as to create a right by

(1) 4 Bro. P. C. 34.

contract. But I do not wish to rest my judgment upon that SARGANT J. ground. Independently of that it is in my opinion quite clear that the ultimate taker had a definite right in the property which would be protected by a Court of Equity during the lifetime of the tenant for life by injunction if necessary; and, if it is necessary to put the obligations of the original taker into a definite legal category, I see no reason why the first taker should not be deemed as to the possession of the articles to be a trustee for the remainderman subject to her own life interest, and to be subject in that respect to the ordinary law of trust; or, if that is not a correct way of putting it, it may well be that the first taker is in the position of a bailee of the articles the possession of which on her death she is through her legal personal representative bound to deliver over to the ultimate taker. I see no reason at all for thinking that the claim of the ultimate taker is necessarily a claim for tort, and I do see a difficulty in the way of the legal personal representative of the first taker setting up the tort of his testator in answer to a claim by the remainderman to the possession of the articles.

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If that is the true view, namely, that the possession taken by the first taker is subject to an obligation, whether by way of trust or by way of implied contract as a bailee, any difficulty with regard to enforcing a claim for damages against the estate of the person in question is gone: and I think also that any doubt as to the measure of damages is also gone, at least with regard to the diamond necklace, as to which it is clear that the loss is attributable primarily to the lady having caused the diamond necklace to be broken up in a way which she was not entitled to do. It seems to me that, if there is a breach of an obligation of that kind, the person who is damaged and who was entitled to receive the specific article is entitled to compensation in the shape of money sufficient to enable him to replace the article. It would not be sufficient to give him either the amount which would have been realized by selling the article or the middle price between that amount and the amount which it would require to replace the article. That principle is quite familiar in this Court. For instance in a case where a trustee sells trust property without a breach of trust and then

SARGANT J. afterwards applies the proceeds for his own purposes he is compellable only to account for the money he received with 4 per cent. interest ; but, if he were selling the property for the purpose of committing the breach of trust, his obligation, if the cestui que trust so requires, is not merely to account for the money that he received with 4 per cent. interest, but to replace the fund that he wrongfully sold, because the right of the cestui que trust which was first violated was a right to the property itself. In the present case, when we have arrived at the conclusion that by virtue either of an implied trust or of an implied contract in the nature of a bailment the remainderman was entitled to the specific property, it follows that, if that specific property is not accounted for and has been lost through the default of the tenant for life, then the measure of damages is the larger measure of the three that have been mentioned in argument, namely, the amount that is required to replace the property. [His Lordship then examined the evidence as to what the jewellery really was and its value, and allowed the sum of 930*l.* to restore the necklace as it was before, 55*l.* for the smaller articles of jewellery, and 45*l.* for the lace.]

Solicitors: *Page & Scorer, Agents for Burton, Scorers & White, Lincoln ; Witham, Roskell, Munster & Weld.*

A. C.

In re DAVEY.
PRISK *v.* MITCHELL.

[1882 D. 1241.]

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Feb. 17;
March 16.

Will—Construction—Ultimate Gift over after Gifts void for Remoteness—Alternative and Independent Gift—“Without leaving issue as before mentioned”—Meaning.

The testator made certain provision out of part of his residuary estate for his nephew R. D. during his life, and as to all the residue gave the same upon trust for the first son born of the body of R. D. as should live to attain twenty-one (provided such son should be christened John or should assume the name of John Davey), the whole of the capital to be paid to him on attaining twenty-one, and in default of any such son upon trust for the first son born of the body of either of the daughters of R. D. who should attain twenty-one (provided as aforesaid), and in default of any such son of a daughter then in trust as to one half of the capital for the first daughter of R. D. who should have attained twenty-one, her executors and administrators, and as to the other half for charities, “and in case of the death of the said R. D. without leaving lawful issue as before mentioned then as to the whole thereof” upon trust for certain charities.

R. D. died without ever having had a child, and his next of kin and heir-at-law claimed his residuary estate on the ground that the ultimate gift to charities was void for remoteness:—

Held, (1.) that the trusts for the first son of a daughter of R. D. who attained twenty-one and in default for the first daughter of R. D. who should have attained twenty-one were void for remoteness;

(2.) (per Lord Cozens-Hardy M.R. and Joyce J.) that although “without leaving” might be construed as meaning “without having” in cases where such a construction was necessary in order to obviate the divesting of an otherwise actually vested interest, yet such a construction was not admissible in the present case for the sole purpose of rendering the ultimate gift over to the charities void for remoteness;

(3.) that “issue as before mentioned” meant nothing further than before mentioned issue (i.e., a son, a son of a daughter, or a daughter) and did not import as well the qualifications by majority or name attached to the vesting of their original gifts; and

(4.) that the ultimate trust for the charities was an alternative and independent gift upon an event ascertainable at the death of R. D., and was good.

Attention called to errata in the report of *In re Cobbold* [1903] 2 Ch. 299 (note, p. 847, post).

Decision of Astbury J. affirmed.

APPEAL from Astbury J.

John Davey died on March 19, 1882, having by his will made

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certain provisions out of part of his residuary estate in favour of his nephew Richard Davey during his life, followed by this disposition: "And as to all the rest residue and remainder of my property not herein otherwise disposed of Upon trust for the first son born of the body of the said Richard Davey in lawful wedlock as shall live to attain the age of twenty-one years provided such son shall be christened 'John' and shall bear the name of John Davey or in case he shall not be so christened shall assume and bear that name such son to receive his maintenance and a first class education and to be taught some trade or profession out of the income of the said residuary property And the whole of the principal fund or capital to be paid over or transferred to him on his attaining the age of twenty-one years And if the said Richard Davey shall have no son so christened or so assuming the name of John Davey as aforesaid Then upon trust for the first son born of the body of either of the daughters (in lawful wedlock) of the said Richard Davey who shall attain the age of twenty-one years provided he shall be christened or assume and bear the name of John Davey as aforesaid And in default of there being any such son of the body of the said Richard Davey or of the body of either of the daughters of the said Richard Davey so bearing the name of John Davey as aforesaid Then in trust as to one half of the said capital of my residuary estate with all accumulations thereon Upon trust for the first daughter of the said Richard Davey who shall have attained the age of twenty-one years her executors and administrators absolutely for her sole and separate use Such half being taken as far as possible out of such portion of my residuary estate as cannot legally be devoted to charitable purposes And as to the other half thereof or so much thereof as can be legally applied to charitable purposes And in case of the death of the said Richard Davey without leaving lawful issue as before mentioned Then as to the whole thereof Upon trust to pay thereout to the Treasurer for the time being of the Wesleyan Foreign Missionary Society for the purposes of the said Society such a sum as when invested in Consols would produce the clear annual income of 100*l.* and the remainder thereof to the Official Trustee of Charities" to be applied as in the will mentioned.

Richard Davey died on January 4, 1914. He never had any issue.

This was a petition in an action commenced in 1882 for the administration of the testator's estate, the petitioners being the legal personal representatives of one of the next of kin and also heirs-at-law of the testator, and asking for the distribution of the funds in Court representing part of the testator's residuary personal and real estate among his next of kin and heirs-at-law, thus raising the question of the validity of the dispositions above set out. Astbury J. held that the ultimate trust was an alternative gift over providing for the event, which happened, of Richard dying without leaving him surviving, or alternatively, without having had, a son, a daughter, or a son of a daughter, and was a valid gift.

The petitioners appealed.

P. O. Lawrence, K.C., and *J. F. W. Galbraith*, for the appellants. The gift to the first born son of the body of Richard who shall live to attain twenty-one is a gift vesting in possession on the happening of that event, subject of course to the fulfilment of the conditions relating to the name "John Davey," and is a stronger case than a gift vesting in interest. If there is no such son of Richard then the gift is to the first son born of either of Richard's daughters who shall attain the age of twenty-one subject to the like condition, and that also is a gift vesting in possession. If there is no such son of a daughter then there is a gift of one moiety to the first daughter of Richard who shall have attained twenty-one, her executors and administrators, absolutely, and that also is a gift vesting in possession.

[*PHILLIMORE L.J.* In the gift of the other moiety the words "to charitable purposes" can be read as indicating the objects of the gift and not merely the method of its application?]

Yes, that is so. Then comes the final gift over to charities "in case of the death of Richard without leaving lawful issue as before mentioned," and in that gift "without leaving issue as before mentioned" must be read "without having issue who have attained a vested interest," for unless the gift is so construed there will be a divesting of the vested interest of a son of Richard

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 1915 in case such son or daughter has died in the lifetime of Richard;
 DAVEY, but the Court will never so divest a vested interest and in order
In re. to avoid that result will construe "without leaving" as meaning
 PRISK "without having" or "without having had": *Treharne v.*
 v. *Layton* (1); *In re Cobbold* (2); *In re Roberts* (3); *Maitland v.*
 MITCHELL. *Chalie* (4); *Hawkins on Wills*, 2nd ed. p. 260.

This gift over was never intended by the testator to divest a gift to a son or a daughter's son or a daughter who attained twenty-one and died before Richard, and that this is so appears abundantly from the gift to the daughter her executors and administrators, which shows clearly that the testator was contemplating the possibility of the daughter having died in Richard's lifetime.

If on the contrary "leaving" is to be construed strictly, as the respondents contend, that involves the idea of surviving, and on that construction a son born after Richard's death of a daughter dying before she attained twenty-one would not take at all although he would clearly come within the description "issue as before mentioned," but all the residue would go to charities, and that we submit can never have been the intention of the testator. Moreover, that construction would lead to this absurdity, that if there was a son of Richard who attained twenty-one, then, notwithstanding the clear specific direction in the will that the fund was to be paid to such son on attaining twenty-one, the fund so paid would many years afterwards be taken away if the son to whom it was paid happened to die in his father's lifetime.

"Issue as before mentioned" means not only the issue mentioned or referred to, but imports as well all the conditions, including the attainment of twenty-one—*Hancock v. Watson* (5)—and must be construed as meaning "without having issue who attained a vested interest": *In re Cobbold*. (2) The rule that the Court will not construe "leaving" so as to divest vested interests is well established and extends far beyond issue, even to strangers: *Casamajor v. Strode*. (6)

(1) (1875) L. R. 10 Q. B. 459.

(2) [1903] 2 Ch. 299.

(3) [1903] 2 Ch. 200.

(4) (1822) 6 Madd. 243.

(5) [1902] A. C. 14.

(6) (1843) 8 Jur. 14.

Upon the true construction of this will the final gift over in the event of Richard's death without leaving issue as before mentioned is not an alternative independent gift, but is all of one piece with the earlier gifts upon which it follows and depends. The gift to the first son of Richard who attains twenty-one does not offend the rule against perpetuities, but the gift to the first son of a daughter of Richard who attains twenty-one is void for remoteness, and the limitation to a daughter of Richard being dependent upon default of either daughter having any such son is also void, and it follows that the final gift construed, as we submit it ought to be construed, as being a gift over in the event of the death of Richard without having issue who attained a vested interest under the previous gifts, being dependent on prior void limitations, is itself also void, and the next of kin and heirs-at-law are entitled to the residue.

Where a gift embraces both valid and invalid limitations and there is a gift over on an event embracing both valid and invalid limitations the Court will not split up the compound event in order to give effect to the valid limitation—*Monypenny v. Dering* (1); *In re Bence* (2)—but the whole gift over is void.

Sir S. O. Buckmaster, S.-G., and Austen-Cartmell, for the Attorney-General. Having regard to the gift of maintenance, we accept the proposition that the gift to the first son of Richard vested at his birth, but the gift to the first son of a daughter who attained twenty-one is contingent and there is nothing to vest that at birth, and the same observation applies to the gift to the daughter. Then comes the final gift over, and it is not associated with the former gift to the daughter at all, but is altogether independent. Whatever has happened before this final gift the testator has deliberately cut down the conditions on which the charities take to conditions which can only happen in Richard's lifetime.

"Without leaving issue" means in ordinary use "without leaving issue living at the death of the person referred to" and is only read otherwise to avoid divesting already vested interests, and has never been so read in order to avoid for remoteness a gift which would otherwise in the ordinary sense be perfectly good. Richard never had any son, and the gift to the son of his

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(1) (1852) 2 D. M. & G. 145.

(2) [1891] 3 Ch. 242.

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daughter is bad, and so is the subsequent gift to the daughter, and, that being bad, neither takes anything and there is nothing to divest. So that there is no reason for construing "leaving" as "having" in this case for fear of divesting vested interests, for there were none such.

The final gift over must be construed independently of whether the previous gifts are void for remoteness or not, and if the word "leaving" be construed in its ordinary sense that gift over is perfectly good. Although previous gifts are void for remoteness, a gift over limited on a good event not so void is good, and whether "leaving" is construed as "leaving issue living at the death" or as "having had" issue, neither event is too remote. There is no difficulty in construing the words "issue hereinbefore mentioned" if the word "leaving" be given its proper meaning, it only means if there are none of that particular class or description of issue living and surviving. "Leaving" refers and applies to an event ascertainable at Richard's death. Even if "leaving" be construed as "having had," that does no harm to our contention, but we submit that it must not be construed as "having" in the general sense so as to include possible issue born after Richard's death. It has never been construed "having" except to save prior vested interests.

The ultimate gift is independent of the original gifts and is an alternative gift which comes into operation on an event which can be determined and fixed within the limits of perpetuities and is good: *Monypenny v. Dering*. (1)

P. F. S. Stokes, for the Wesleyan Foreign Missionary Society, adopted the same argument.

P. O. Lawrence, K.C., in reply.

• *Cur. adv. vult.*

March 16. JOYCE J. The testator died in 1882 leaving a nephew, Richard Davey, who was a bachelor at the testator's death. This nephew subsequently married and has died (January, 1914) without having had issue.

The testator by his will made a somewhat peculiar provision for the nephew, and disposed of all the rest, residue, and remainder

of his property not therein otherwise disposed of in the following terms (I am not reading them verbatim but only so far as I think is material): "And as to all the rest residue and remainder of my property Upon trust for the first son born of the body of the said Richard Davey as shall live to attain the age of twenty-one years (provided such son shall be christened 'John' and shall bear the name of 'John Davey' or in case he shall not be so christened shall assume and bear that name) the whole of the principal fund or capital to be paid over or transferred to him on his attaining the age of twenty-one years And if the said Richard Davey shall have no son so christened or so assuming the name of 'John Davey' as aforesaid Then upon trust for the first son born of the body of either of the daughters of the said Richard Davey who shall attain the age of twenty-one years provided he shall be christened or assume and bear the name of John Davey as aforesaid And in default of there being any such son of the body of the said Richard Davey or of the body of either of the daughters of the said Richard Davey so bearing the name of John Davey as aforesaid Then in trust as to one half of the capital of my residuary estate with all accumulations thereon Upon trust for the first daughter of the said Richard Davey who shall have attained the age of twenty-one years her executors and administrators absolutely for her sole and separate use and as to the other part thereof" as in the will mentioned. "And in case of the death of the said Richard Davey without leaving lawful issue as before mentioned Then as to the whole thereof upon trust to pay thereout to the Treasurer for the time being of the Wesleyan Foreign Missionary Society," and so on.

Whether the contingent trust for the first son born of the body of Richard Davey be void or not, the trust for the first son of any daughter of his who shall attain twenty-one—which means the first son that shall attain twenty-one of any daughter—is certainly void for remoteness.

So also is the subsequent trust of one half for the first daughter of Richard Davey who shall have attained twenty-one, her executors and administrators, and of the other half for charities, because this is so limited as to be dependent upon the previous limitation which is void as too remote.

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But there follows this limitation: "And in case of the death of the said Richard Davey without leaving lawful issue as before mentioned then as to the whole thereof upon trust" &c. for charities. If this limitation upon trust for the charities is to be read in any manner so as to mean simply in default of the preceding limitations taking effect, it is manifestly void for the same reason as the trust of half for the first daughter of Richard Davey who attains twenty-one is void. But in my opinion it ought not to be so read. We must construe the limitation as we find it, we may not alter the words. Especially is it not admissible to do this in order merely to make the limitation obnoxious to the rule against perpetuities and so void.

If the trust of the whole for the charities had been limited to take effect in case of the death of Richard Davey "without leaving lawful issue" simply, without the qualifying words "as before mentioned," it would not have been open to objection on the ground of remoteness. But the event upon which the trust arises is the death of Richard Davey "without leaving lawful issue as before mentioned." The only issue of Richard Davey before mentioned are a son, a daughter, and a (grandson) son of a daughter. In my opinion if Richard Davey died leaving any one of these (son or daughter or son of a daughter) living at his decease the trust of the whole in favour of the charities would not take effect inasmuch as the event upon which it was limited to arise never happened. If Richard Davey died without leaving any of these (son or daughter or son of a daughter) then the trust for the charities would arise. And inasmuch as whether Richard Davey died without leaving any one of these must of course appear at the time of his death the trust for the charities would not be too remote.

If it be urged that the son, daughter, and grandson "before mentioned" are only such a son, daughter, and grandson (son of a daughter) as live to attain twenty-one, still whether the event upon which the trust for the charities is limited to arise does or does not happen must (that is would necessarily) appear or be ascertained at latest within twenty-one years from Richard Davey's death. Richard Davey does not leave a grandson who

attains twenty-one if he dies without leaving any grandson at all at the time of his death.

But it was contended on behalf of the appellants that the expression "without leaving lawful issue as before mentioned" ought to be read not literally but as equivalent to "without having lawful issue as before mentioned." And this not in order to prevent an otherwise actually vested interest being taken away, but so as to render the limitation to the charities void for remoteness, the suggestion being that Richard Davey could not be said to have died without having "issue as above mentioned" if he had a grandson—son of a daughter and born after his death—although such daughter never attained twenty-one and was not such issue as above mentioned, if a necessary qualification of such issue was the attaining twenty-one. If this contention prevailed the trust for the charities might be too remote, as it would not necessarily be ascertained within twenty-one years from Richard Davey's death whether he would have such a grandson or not.

The Solicitor-General on the other hand contended that if we do not adhere to the literal meaning of the phrase "without leaving" we may not understand it in the sense of "without having," that is without having generally but only in the sense of "without having had," that is having had prior to the decease of the person whose death is referred to, and that we ought not to take any account of a possible grandson not born until after the death of Richard Davey. I agree with this contention. For in every case in which the phrase "without leaving issue" or any similar expression has been read as "without having" &c., the latter phrase has, I think, always been used in the sense of "without having had," that is, without having had in the lifetime of the person whose death is referred to, and not in the more general sense of without having either after his death or in his lifetime—in other words without having at any time whether before or after his death.

If indeed "death without leaving lawful issue as before mentioned" might possibly mean death without having a son or a daughter or a son of a daughter who in the lifetime of Richard Davey acquired a vested interest by attaining twenty-one, it

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cannot be read as meaning without having a son of a daughter who, not being born until after the death of the person whose death is referred to, may afterwards live to attain twenty-one.

If this be right, as I think it is, the trust for the charities is not too remote and the appeal fails.

LORD COZENS-HARDY M.R. I have read Joyce J.'s judgment, with which I agree, and I do not think it necessary to add more than a few observations.

The question is whether what I may call the fourth gift, under which the charities claim, is not only subsequent to, but dependent on, the second and third gifts, and is to be read as equivalent to "subject to and on the failure of all the previous trusts." If so, the fourth gift fails, for the third gift is certainly void for remoteness. I do not pause to consider whether the second gift is not also void. In my opinion the above is not the correct view. I regard the fourth gift as a new departure, an independent and alternative gift.

Then arises the question as to the meaning of "without leaving lawful issue as before mentioned." I think it means (A) son of Richard, (B) son of Richard's daughter, and (C) Richard's daughter, and that it does not import the attainment of twenty-one, or the assumption of the christian name John Davey. If so there is no difficulty. The event must be ascertained during the life of Richard Davey.

The result is that in my opinion Astbury J.'s decision was correct, and the appeal must be dismissed. But having regard to the obscurity of the will I think the costs of the appeal, as well as of the original hearing, shall be paid out of the residuary estate.

PHILLIMORE L.J. I agree generally with the judgment just delivered by Joyce J., but I desire to add a qualification. I am not prepared at the moment to assent to a ruling that "without leaving" means either "without leaving him surviving" or "without having had." I desire to reserve my opinion. I should not, without further consideration, be prepared to hold (as a matter of construction) that if Richard Davey had died

leaving a daughter who, after his death, had a son who, in due course, attained twenty-one, and qualified as to name, that grandson of Richard Davey would be excluded. But I am content to rest my judgment upon the construction that "lawful issue as before mentioned" means the lawful issue before mentioned, that is son, daughter, and daughter's son, to the exclusion of son's daughter and daughter's daughter, and does not mean lawful issue as before qualified, that is qualified by name or majority.

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Solicitors: *Robbins, Olivey & Lake, for Grylls & Paige, Redruth; Walker & Battiscombe; The Treasury Solicitor.*

R. M.

NOTE.—During the course of the argument it was pointed out that in line 7 of the headnote to *In re Cobbold* [1903] 2 Ch. 299, and in Romer L.J.'s judgment on p. 304, line 6 from foot, the word "not" should, as appears from the errata to that volume, be deleted, and further that "leaving" in the same line and in line 6 of the headnote should read "without having" or "without having had."

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WARRING-
TON J.

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[1915 B. 221.]

March 15. *Trading with the Enemy—Practice—Cheque drawn by German Bank on English Bank—Cheque dishonoured—Summons by Holders to vest in Custodian alleged Credit Balance in Hands of English Bank—Denial by English Bank of Existence of such Balance—Parties to Summons—Costs—Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12), s. 3, sub-s. 1; s. 4, sub-s. 1—Trading with the Enemy (Vesting and Application of Property) Rules, 1915, r. 2 (3.), (4.).*

Sect. 4, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914, which empowers the Court on the application of a creditor of an enemy to vest in the custodian any real or personal property belonging to the enemy, is directed against specific property which can be definitely pointed out and does not include an alleged credit balance on a running account between the enemy and a bank, the existence of which balance is denied by the bank.

A debtor to an alien enemy is not a "person who holds or manages for or on behalf of an enemy any property" within the meaning of s. 3, sub-s. 1, of the same Act and ought not therefore under r. 2 (4.) of the Trading with the Enemy (Vesting and Application of Property) Rules, 1915, to be named as a respondent to an originating summons for a vesting order under s. 4, unless, at any rate, it is clear that he admits the debt.

ORIGINATING SUMMONS.

This was an application under s. 4 of the Trading with the Enemy Amendment Act, 1914 (1), by Messrs. Seligman & Weinberger, a firm of stockbrokers carrying on business in the city of London, for an order that the personal property or rights in or

(1) Trading with the Enemy Amendment Act, 1914, s. 4, sub-s. 1: "The High Court or a judge thereof may, on the application of any person who appears to the Court to be a creditor of an enemy or entitled to recover damages against an enemy, or to be interested in any property, real or personal (including any rights, whether legal or equitable, in or arising out of property real or personal), belonging to or held or managed for or on behalf of an

enemy, or on the application of the Custodian or any Government Department, by order vest in the Custodian any such real or personal property as aforesaid, if the Court or the judge is satisfied that such vesting is expedient for the purposes of this Act, and may by the order confer on the Custodian such powers of selling, managing and otherwise dealing with the property as to the Court or judge may seem proper."

arising out of personal property mentioned in the summons might vest in the custodian, and that there might be conferred on him such powers of selling, managing, and otherwise dealing with the property as might seem proper, and that the custodian might be authorized to pay out of the property a debt of 1400*l.* due by the Bank für Handel und Industrie to the applicants.

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The property or rights referred to in the summons were the following :—“ A sum of 1400*l.*, or thereabouts, deposited with or remitted to the London and Liverpool Bank of Commerce, Limited, by the said Bank für Handel und Industrie, to meet a cheque for 1400*l.* drawn by the Bank für Handel und Industrie on July 29, 1914, in favour of H. Waetge & Co., on the London and Liverpool Bank of Commerce, Limited, and indorsed by H. Waetge & Co. to the applicants on July 30, 1914; any credit balance of the Bank für Handel und Industrie with the London and Liverpool Bank of Commerce, Limited; and debts owing of the London and Liverpool Bank of Commerce to the Bank für Handel und Industrie.”

The respondents to the summons were the Bank für Handel und Industrie (hereinafter called the German bank), the London and Liverpool Bank of Commerce, Limited (hereinafter called the English bank), and the Public Trustee as custodian.

The facts were as follows : In July, 1914, before the outbreak of the war, the applicants were owed a sum of 1400*l.* by one of their clients, H. Waetge & Co., a German firm. With a view of paying that debt, H. Waetge & Co. obtained from the German bank a cheque for 1400*l.* drawn to their order by the German bank on the English bank. That cheque was received in London on August 1, 1914. It was indorsed by H. Waetge & Co. to the order of the applicants and indorsed by them. It was presented for payment in due course and was dishonoured. On August 7 it was protested by a public notary, and the reason given for its non-payment was that the English bank was stopped from paying under proclamation.

In opposition to the summons an affidavit was filed by the manager of the English bank, in which he deposed that no sum was deposited with the English bank by the German bank to meet the cheque; that there was no credit balance of the German

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bank with the English bank and no debts owing by the English bank to the German bank ; but that on the contrary the German bank owed the English bank a considerable sum on balance of account.

Douglas Hogg, for the applicants. The applicants are creditors of the German bank as holders of the dishonoured cheque and are entitled to the order asked for.

[WARRINGTON J. The Act appears to point to some definite property which I can vest. I am asked to vest in the custodian what is in reality a litigation.]

H. A. McCardie, for the English bank, referred to r. 2 (4.) of the Trading with the Enemy (Vesting and Application of Property) Rules, 1915, as showing the intention of the Act.

Austen-Cartmell, for the custodian. This is not a case in which the order asked for ought to be made. The property contemplated by s. 4, sub-s. 1, of the Act is property to which you can point and not, as here, a possible balance on a running account. If the Court were to make the order asked for, the effect would be to vest in the custodian the right of action of the German bank against the English bank, and that was not the intention of the Act.

WARRINGTON J. This is an application under s. 4 of the Trading with the Enemy Amendment Act, 1914. [His Lordship read sub-s. 1 of s. 4 and stated the facts. He continued :] The cheque was never paid. It was indorsed by H. Waetge & Co. to the order of the applicants and indorsed by the applicants. The result of that was that the German bank became debtors to the applicants, and it is as creditors of the German bank that they make this application.

What is the property of which they seek to have a vesting order? It is clear that there was no definite sum of money remitted to the English bank for the purpose of meeting this cheque and that there was no earmarked sum to meet it. The only property to which the application can apply is a general credit balance in favour of the German bank with the English bank. The latter bank deny that there is any such balance. It

is sufficient for the purposes of this case to say that the English bank bona fide dispute the suggestion that at the present moment they are indebted to the German bank. That being so, if I were to make the vesting order asked for I should be doing nothing more than placing the custodian in the position of the assignee of a disputed debt, and no property could be recovered for the purpose of paying the present applicants under s. 5, sub-s. 2, of the Act, to the provisions of which sub-section they wish to resort ultimately, except by the custodian bringing an action against the English bank as assignee of the suggested balance due from them to the German bank. It was not the intention of the Act that there should be any such result as that, and therefore I decline to make the order. I do not mean to say that an order cannot be made vesting a debt if the debt is admitted.

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Austen-Cartmell. As regards the question of costs the applicants named the custodian as a respondent to the summons and served it upon him under r. 2 (3.) of the Trading with the Enemy (Vesting and Application of Property) Rules, 1915 (1), and having failed must pay his costs.

As regards the English bank it is submitted that they are not proper respondents to the summons. They appear to have been made respondents on the supposition that they were a "corporation holding or managing any property alleged to belong to the enemy." Upon the facts it is denied that there is any such property. Putting the applicants' case at the highest the English bank are only debtors to the German bank. But an English debtor is not a "person who holds or manages for or on behalf of an enemy any property" within the meaning of s. 3, sub-s. 1,

(1) The Trading with the Enemy (Vesting and Application of Property) Rules, 1915:

Rule 2 (3.). "In all cases where the originating summons is not taken out by the custodian, he shall be named as a respondent thereto and it shall be served on him unless the Court shall in any case or class of cases otherwise order."

(4.). "In general and except so

far as the Court may otherwise order the enemy to whom any property may be alleged to belong shall be named as a respondent to any originating summons under section four, and any person or corporation holding or managing any property alleged to belong to the enemy may also be named as a respondent to the originating summons." ([1915] W. N. pt. II. p. 65.)

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of the same Act (1), and consequently he ought not under r. 2 (4.) to be named as a respondent to an application under s. 4 for a vesting order except at the applicant's risk as to costs. If a debtor who is made a respondent admits the debt and submits to pay the money to the custodian, it may and probably would be right to allow him to deduct his costs upon payment over. But if the application fails because the debt is disputed, then there is no reason why the matter should not be dealt with strictly.

WARRINGTON J. The question now is as to the costs of the present application. The custodian appears upon the summons and asks for costs. He is made a respondent under r. 2 (3.) of the Trading with the Enemy (Vesting and Application of Property) Rules, 1915, which provides that "In all cases where the originating summons is not taken out by the custodian, he shall be named as a respondent thereto and it shall be served on him unless the Court shall in any case or class of cases otherwise order." That was done in the present case. The summons was served on him and fails, and the applicants must pay his costs.

The other respondents are the English bank. They were made respondents under r. 2 (4.). [His Lordship read the sub-rule and continued:] In the present case the applicants have named the English bank as respondents on the suggestion that they are a corporation holding or managing property which is alleged to belong to an enemy. To ascertain what is meant by "property" one must look back at s. 3. That section provides: [His Lordship read s. 3, sub-s. 1, and continued:] The English bank, as now appears, are nothing more than, at the outside, debtors to the German bank—whether they are or are not is

(1) Trading with the Enemy Amendment Act, 1914, s. 3, sub-s. 1: "Any person who holds or manages for or on behalf of an enemy any property, real or personal (including any rights, whether legal or equitable, in or arising out of property, real or personal), shall, within one month after the passing of this Act or if the property comes into his

possession or under his control after the passing of this Act, then within one month after the time when it comes into his possession or under his control, by notice in writing communicate the fact to the Custodian, and shall furnish the Custodian with such particulars in relation thereto as the Custodian may require . . ."

disputed. Is a debtor to an alien enemy a person "who holds or manages for or on behalf of an enemy any property"? It seems to me quite plainly that he is not. Looking again at s. 3, the "holding of property" is to be determined by the subsequent words "comes into his possession or under his control." In my judgment that section was not intended to apply to a person or a corporation who are merely the debtors to an alien enemy. That being so, r. 2 (4.) does not apply, and the English bank ought not to have been named respondents; they were brought here on no real ground, and the applicants must pay their costs.

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Solicitors: *Slaughter & May; Bircham & Co.; Coward & Hawksley, Sons & Chance.*

W. I. C.

In re TROLLOPE.
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[1914 T. 1648.]

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Will—Advancement—Hotchpot Clause—Advances by Way of Loan to be "taken in full or in part satisfaction" of Benefits given by Will—Insufficient Estate—Release of Debt.

A testator provided that all advances by way of loan to his son H. and all interest owing on any such advances should be "taken in full or in part satisfaction (as the case may be)" of the benefits given to H. under his will.

It being doubtful whether the legacies and share of residue given to the son would cover his total indebtedness:—

Held, that the son's personal liability was released and that the debts were merely to be brought into account as ordinary advances.

Observations of the Court of Appeal in *Limpus v. Arnold* (1884) 15 Q. B. D. 300 and *In re Cosier* [1897] 1 Ch. 325 followed.

In re Schweder [1893] W. N. 12; 37 Sol. J. 249, not followed.

ORIGINATING SUMMONS.

By his will dated August 3, 1900, a testator, after appointing his son Howard and the plaintiffs his executors and trustees, proceeded: "Whereas I advanced to my said son Howard . . . the sum of 25,000*l.* at interest at 5 per centum by way of loan on

ASTBURY J. his entering into the firm of George Trollope and Sons Now I
 1915 hereby give and bequeath the sum of 25,000*l.* to my said son
 TROLLOPE, Howard absolutely And I hereby direct that the said
In re. advance of 25,000*l.* or so much thereof as shall remain owing at
 GAME my decease shall be taken in full or part satisfaction (as the case
v. may be) of the legacy hereinbefore bequeathed.”
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After directing his executors and trustees to pay his debts out of his other personal estate not specifically bequeathed, the testator bequeathed fifty-three shares in the Belgrave Mansions Company, ten debentures in the Mount Street Mansions Company, and 1580 preference shares in the Stuart Granolithic Company to his son Howard.

After reciting that he had advanced 2000*l.* to his daughter Madeline to purchase shares in the Corticine Floor Covering Company the testator specifically bequeathed 100 shares in the Belgrave Mansions Company, eighty debentures in the Mount Street Mansions Company, and five leasehold messuages in Cadogan Square to his trustees upon trusts in favour of Madeline, her husband and children.

The testator also specifically bequeathed 2000*l.* 3 per cent. Redeemable Stock in the Lambeth Water Works Company, 100 shares in the Belgrave Mansions Company, eighty debentures in the Mount Street Mansions Company, and five leasehold messuages in Cadogan Square to his trustees upon similar trusts in favour of his daughter Josephine, her husband and children.

The testator also specifically bequeathed 2000*l.* 3 per cent. New East India Railway Stock, 100 shares in the Belgrave Mansions Company, eighty debentures in the Mount Street Mansions Company, and five leasehold messuages in Cadogan Square and Pont Street to his trustees upon similar trusts in favour of his daughter Millicent, her husband and children.

The testator declared that in case either of his three daughters died without having or leaving a child who acquired a vested interest her settled share (subject to her husband's life interest) should be held in trust for the others of the testator's four children Madeline, Howard, Josephine, and Millicent, the daughters' accruing shares to be held on the trusts of their original shares.

The testator also directed his trustees to set apart a sufficient part of his estate to produce an annuity of 600*l.* a year. This was to be paid to his son John for life, and 300*l.* a year was to be paid to John's present wife Euphemia if she survived him. Subject to these annuities the appropriated funds were to be divided equally among the testator's other four children, Madeline, Howard, Josephine, and Millicent.

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The testator also settled 6000*l.* upon certain trusts in favour of his grandson Cyril, son of John, and his wife and children, and in default of children attaining a vested interest the income was to be applied in the same manner as the 600*l.* annuity, and subject thereto the 6000*l.* trust legacy was to fall into residue.

The testator devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion and upon trust to divide the same equally between his four children Madeline, Howard, Josephine, and Millicent.

By a codicil dated March 28, 1912, the testator, after making certain bequests and bequeathing certain life annuities in favour of his brother and nieces, proceeded: "Whereas the sum of 25,000*l.* referred to in my said will as having been advanced to my son Howard . . . is still owing together with a considerable arrear of interest And whereas since the date of my said will I have advanced to my said son a further sum of 1250*l.* at interest at 3½ per centum per annum by way of loan and have also advanced to him and my nephew George . . . the sum of 4150*l.* at interest at 5 per centum per annum on the security of their joint promissory note and the deposit of certain shares in the Mount Street Mansions Company Now I hereby direct that all advances made by me to my said son Howard . . . (or to him and any other person jointly) which shall remain owing at my decease and all interest that may be owing on any such advances shall be taken in full or in part satisfaction (as the case may be) of the legacy of 25,000*l.* and the various other benefits given to my said son Howard . . . under my said will but I direct that in case the said sum of 4150*l.* or any part thereof shall be due and owing at the time of my death, the benefits given to my said son under my will shall not be charged with more than the sum of 2100*l.* in respect of such loan."

ASTBURY J. He also bequeathed 2000*l.* Metropolitan Water Board debentures
 1915 to his trustees in lieu of the 2000*l.* 3 per cent. Redeemable
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In re. be held upon the trusts of the settled share of Josephine.
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The testator died on February 10, 1914.

His three daughters and two sons and his grandson Cyril and his daughter-in-law Euphemia were still living.

At the testator's death his son Howard owed him the 25,000*l.* and 4539*l.* interest and the 1250*l.* and 18*l.* interest. The said sum of 4150*l.* advanced on the joint promissory note of Howard and George was also due, but all interest had been paid. The joint maker George did not dispute his liability to pay 2050*l.* (the balance of the 4150*l.* after deducting the 2100*l.*) and interest. The promissory note was joint, and not joint and several.

As there was some doubt whether the 25,000*l.* legacy and the other benefits given to Howard would be sufficient to discharge his total indebtedness to the estate, the plaintiffs issued this summons on November 27, 1914, to determine (*inter alia*) whether upon the true construction of the will and codicil he was liable to make good any amount that was not so discharged.

Austen-Cartmell, for the executors.

Micklem, K.C., and *C. J. Parton*, for Howard. The effect of the codicil is to release the debts at the date of distribution, which in this case is the testator's death. They are to be brought into account as advances, but the personal liability is gone: *Limpus v. Arnold*.⁽¹⁾ A direction that a debt is to be taken in full or in part satisfaction of a legacy or share of residue or brought into hotchpot operates as a gift of the debt: *In re Cosier*.⁽²⁾ That case was affirmed by the House of Lords on different grounds: *Wheeler v. Humphreys*.⁽³⁾ The House of Lords took a different view of the ambit of the hotchpot clause, but there is nothing in their observations to conflict with the judgments of the Court of Appeal on the hotchpot clause as they construed it. Unless the codicil amounts to a gift of the debts as part of the legacies or share of residue it is otiose. An

(1) (1884) 13 Q. B. D. 246; 15 Q. B. D. 300.

(2) [1897] 1 Ch. 325.

(3) [1898] A. C. 506.

unreleased debt would of course have to be paid, but it cannot be taken in satisfaction of benefits or brought into hotchpot unless it is first given to the debtor.

Hon. Frank Russell, K.C., and Edwardes Jones, for the three daughters. The codicil is not otiose. It not only enables the debts to be retained out of the specific legacies as well as the share of residue, but it would also operate in the case of a statute-barred debt: *In re Akerman*. (1) It is a charging and not a discharging clause, and there is no release of the debt: *In re Schweder* (2); *In re Warde*. (3) In *Limpus v. Arnold* (4) it was really conceded that the debt was released, and the only question was at what date it was released. It appears from the *Law Journal* reports of that case (5) that the benefit in fact exceeded the debt. In *In re Cosier* (6) the benefit again exceeded the debt. The Court of Appeal no doubt treated the hotchpot clause as a clause of gift, but the House of Lords (7) did not approve of this reasoning and affirmed the decision on quite a different ground. If a hotchpot clause is intended to operate as a gift appropriate words must be added: Davidson's Precedents, 3rd ed. vol. iv. p. 158; Key and Elphinstone's Precedents, 10th ed. vol. ii. p. 893. The scheme of this will and codicil is equality between Howard and his three sisters, both as to the specific gifts and as to the shares of residue, and it is inconceivable that a release of these large debts was intended. The distinction between an advance and a loan is pointed out in *In re Willoughby*. (8)

Micklem, K.C., in reply. The short reports of *In re Schweder* (2) cannot be relied on. The legacies were really demonstrative, each debt being indicated as a fund for payment. No legacy could therefore abate to a less amount than the debt, so that the decision as reported is clearly erroneous. Chitty J. apparently misapprehended the true effect of a hotchpot clause, and his subsequent decision on the hotchpot clause in *In re Cosier* (9)

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| (1) [1891] 3 Ch. 212. | L. J. (Q.B.) 85. |
| (2) [1893] W. N. 12; 37 Sol. J. 249. | (6) [1897] 1 Ch. 325. |
| (3) (1914) 111 L. T. 35. | (7) [1898] A. C. 506, 510, 512. |
| (4) 13 Q. B. D. 246; 15 Q. B. D. | (8) [1911] 2 Ch. 581, 598. |
| 300. | (9) [1897] 1 Ch. 325; [1898] A. C. |
| (5) 53 L. J. (Q.B.) 415, 416; 54 | 506. |

ASTBURY J. was reversed. In *In re Warde* (1) the hotchpot clause did not mention debts or advances by way of loan, and Sargant J. held that it was confined to advances by way of portion. The decision does not touch the present point.

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ASTBURY J. (after stating the facts). There is a doubt on the evidence whether the benefits bequeathed to the testator's son Howard are sufficient in amount to satisfy the son's indebtedness to the testator, and the question now to be decided is whether or not the son is personally liable to the testator's estate for the difference, if any, between the amount of the benefits and the amount of his indebtedness, assuming the latter to be the greater.

With regard to the will, the matter is left in considerable doubt, because the testator recites that he has lent to his son 25,000*l.* at interest. He then gives him a legacy of 25,000*l.*, the same amount as the principal, and directs that the advance of 25,000*l.*, or so much thereof as shall be owing at his death, shall be taken in full or part satisfaction, as the case may be, of the legacy thereinbefore bequeathed. The testator does not say "The advance of 25,000*l.* and the interest owing upon the same shall be taken in full or part satisfaction," as he does in the case of his codicil, and it is quite possible that the true construction of the gift in the will might, apart from other circumstances, be that the 25,000*l.* capital debt should be taken in full satisfaction if not reduced, or in part satisfaction if reduced, prior to the testator's decease. In the codicil, however, the testator says that all advances made by him to this son, and all interest that may be owing thereon, shall be taken in full or in part satisfaction, as the case may be, of the benefits that accrued to him under his will.

I am not clear that this question would be a very difficult one to decide if one simply regarded the will and the directions contained in it, but the authorities cited seem to place considerable difficulties in my way. Before turning to them I should say that the testator in dividing up his specific gifts among his children before he comes to his residue has apparently sought to

produce equality; although not knowing the exact respective values of those specific gifts, I cannot say that that equality is intended to be absolute. In the bequest of residue it is quite plain that the testator intended that there should be equality.

In *Limpus v. Arnold* (1) the testator had advanced by way of loan to his son a certain amount at interest during his lifetime; by his will he devised and bequeathed all his real and personal estate to his trustees in trust for his wife during widowhood, and subject thereto in trust for his children equally. The will contained a proviso very similar to the one in the present case: "That any advances made by the testator to any child or to the husband of any child in his lifetime together with interest on such advances, as charged against such child or her husband in his private memorandum book in his own handwriting, should, according to the amount thereof, be taken"—and here the words are identical—"in full or in part satisfaction of his or her share in the testator's property." The widow's executors sought to make the son liable for interest on his indebtedness during the widow's life, the executors, of course, having no interest in the question as to whether this debt was released for any other purpose. The Divisional Court held that the widow's executors were entitled to recover this interest from the son, and that the clause did not release the debt, if at all, until the period of distribution, i.e., the widow's death. In that case no evidence was given that the son's debt exceeded the value of the share of the estate bequeathed to him. The only question argued and decided was as to the liability of the son to pay interest on the debt during the lifetime of his mother. Brett M.R. and Lindley L.J. affirmed the decision of the Divisional Court, Cotton L.J. dissenting. (1)

The actual decision of the majority of the Court of Appeal really has little bearing upon the present question, as the majority of the Court decided that on the true construction of that particular will it was plain that the testator did not intend the proviso in question to apply until the period of distribution.

There are, however, certain dicta relied upon by the son in the present case which I will refer to shortly. Brett M.R.

(1) 13 Q. B. D. 246; 15 Q. B. D. 300.

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ASTBURY J. said (1): "The other parts of the will show that his property is to be divided amongst his children. But when? After his wife's death. It seems to me that unless there is some rule to the contrary, the testator's intention was plain enough: first of all, he was willing, at this time, that that which had been a debt bearing interest payable to him, should be treated as an advance. This clause was wanted to make that which otherwise would be a debt to be paid and recovered, an advance, and it ought to be treated as an advance." Cotton L.J. differed from the other two members of the Court in thinking that the son's debt was released as from his father's death. He says (2): "We must remember this, that if this was a debt, of course the son, until he paid that debt and made good that debt, could not have received any portion of his share of residue. What is the meaning of this clause? It is conceded on behalf of the respondents, the plaintiffs in the action, that this has the effect of making a gift to the son of this debt, of releasing him from the debt as from the date of the distribution." As a matter of fact it was immaterial to the plaintiffs what happened to this debt after that determination of the widow's interest. Then the Lord Justice proceeds in a sentence which, in my humble opinion, is very difficult to understand (3): "If the share of the residue had not been equal to the debt, then it was still a debt, and he remained liable to pay and make good the balance, and therefore it is conceded that there is at the time a gift to the son of this amount: a release of him from the debt. But is that the right construction? Is it not this, that these sums which were lent to the son before the date of the will are to be considered as if they were gifts by way of advancement made subsequently, and to be brought into hotchpot on that ground? I think it is the latter construction." Lindley L.J. says (4): "When are these debts converted into gifts or legacies? One must look at that, and see where one is to find out." Then he reads the clause and says (4): "When is that to come into operation? It is said on the one hand it is to come into operation the moment the testator dies; I cannot come to that conclusion. It appears to

(1) 15 Q. B. D. 304.

(2) 15 Q. B. D. 306.

(3) 15 Q. B. D. 307.

(4) 15 Q. B. D. 311.

me it comes into operation at the time when the children are dividing the residue. Whether the word 'advances' there is used to cover both gifts or loans, if there were any gifts—which is my own impression—or whether it is to cover loans here, it seems to me to include loans by reason of the reference to the memorandum book, and I do not think when we bear in mind that these were indisputably debts bearing interest, that we can say that the interest is to be stopped before the time arrives for extinguishing the principal debt. When the fund is to be divided, the debt is to be deducted, or the advance, or whatever it is called, is to be deducted from the share, and then everything works perfectly smoothly."

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It appears from the report of this case in the *Law Journal* (1) that the share of the son in the testator's estate in fact exceeded the amount of this indebtedness, but I think it is impossible to read these judgments without coming to the conclusion that all three members of the Court of Appeal were of opinion that the proviso that the debt should be taken in full or part satisfaction of the share bequeathed to the testator's son constituted and implied a release of that debt, the only question in the case being the date at which that release took effect.

The next case to which I was referred is a decision of Chitty J. in *In re Schweder* (2), which is reported only in the *Weekly Notes* and in the *Solicitors' Journal*. It is difficult from these reports to appreciate exactly what the circumstances of this case were, and what was the whole effect of the testator's will, which is not set out. The testator there gave legacies of 7000*l.*, 5000*l.*, and 5000*l.* to his sons, A., B., and C., and declared that "any advances made by him in his lifetime to any child should be brought into hotchpot, and taken in full or part satisfaction of his or her legacy." In that respect the words are practically similar to those in the present case, except for the addition of the clause as to hotchpot. The testator's estate proved insufficient, and all the legacies had to abate by about one-third. It appeared that A. had received an advance of 4000*l.*, B. an advance of 4000*l.*, and C. an advance of 5000*l.*, for which they had each given the testator

(1) 53 L. J. (Q.B.) 415, 416; 54. (2) [1893] W. N. 12; 37 Sol. J. L. J. (Q.B.) 85. 249.

ASTBURY J. their bond. Chitty J. said (1): "It was admitted on the face of the will that the testator did not contemplate the event of his estate being insufficient. It turned out that he was mistaken. He had made a provision for the case of a legatee being a debtor, but clearly on the assumption that his estate was sufficient. His Lordship was asked to say that the debts were released, and that if a debt was less than a legacy there was a legacy of the difference to which the rule of abatement applied. This would be a misapplication both of the clause in the will and of the ordinary rules of abatement. The debts were not unconditionally released, but were to be brought into account, and if any debt exceeded the abated legacy the legatee would have to refund the difference."

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Without knowing more about the will in that particular case it certainly does look as if Chitty J. formed a definite opinion that a proviso that a debt owing by a legatee should be taken in full or part satisfaction of his or her legacy did not amount to a release of that debt if, and to the extent that, the debt exceeded the amount of the benefit.

In *In re Cosier* (2) the Court of Appeal dealt with a will which, in the circumstances of the case, gave rise to questions of very considerable difficulty. In that case the testator on the marriage of his son in 1885 covenanted with the trustees of the son's settlement that his executors should, within six months after his death, pay to them 10,000*l.*, to be held by them upon trust for the son for his life, with remainder to his wife for her life, and after the death of the survivor upon trust for the issue of the marriage, and in default of issue in trust for the father absolutely. The father died subsequently, having by his will given the residue of his estate in trust for his son and daughter in equal shares. The will provided that any and all sums of money which the testator had already covenanted to give to or with any child of his on his or her marriage should—and then the words are practically identical with those in the present case—"be taken in or towards satisfaction of the respective share of such child, or the person or persons claiming under or in substitution for her or him, under the testator's

(1) 37 Sol. J. 250.

(2) [1897] 1 Ch. 325.

will, and should be brought into hotchpot and accounted for accordingly." After the father's death his executors paid 10,000*l.* out of his estate to the trustees of the son's settlement, and divided the residue of the father's estate equally between the son and the trustees of the daughter's settlement, treating the 10,000*l.* as part of the son's share. In 1894 the son died without issue. Chitty J. held that (subject to the life interest of the son's widow) the 10,000*l.* was divisible in equal shares between the son's executors and the trustees of the daughter's settlement. The Court of Appeal reversed this decision and held that (subject to the widow's life interest) the son's executors were entitled to the whole of the 10,000*l.*

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The case subsequently went to the House of Lords sub nomine *Wheeler v. Humphreys* (1), and the House affirmed the decision of the Court of Appeal, but on rather different grounds. The Court of Appeal came to the conclusion that the hotchpot clause in this particular will applied to the whole 10,000*l.*, but the House of Lords held that it did not, and only applied to the interest given therein to the son. But there are a number of passages in the judgments of the Lords Justices which I think it is impossible for me to disregard. Assuming, which the House of Lords did not agree with, that the hotchpot clause, and the clause as to the sum being taken in or towards satisfaction, applied to the whole 10,000*l.*, Lindley L.J. says (2): "Having given half of his residuary estate, including this reversion, to his son, the testator in effect says that this sum of 10,000*l.* 'shall be taken in or towards satisfaction' of the share of the son under the will, 'and shall be brought into hotchpot and accounted for accordingly.' I pause to inquire, Who is to take this sum? Who is to bring it into hotchpot, and who is to account for it? The answer can only be, the son; it cannot be the trustees, for they are creditors of the testator; they take nothing under the will, and are not in a position to take the 10,000*l.* in satisfaction of anything under the will, nor to bring that sum into hotchpot and account for it accordingly. But, if a testator, having an interest in a sum of money,"—apply that in the present case to the debt owing to him by his son—"directs that

(1) [1898] A. C. 506.

(2) [1897] 1 Ch. 330.

ASTBURY J. a legatee of a share of his residue shall take that sum on account of that share, and the legatee does so, as the son did here, the whole sum is taken out of the testator's estate, and, so far as the testator is concerned, that sum ceases to be part of his estate, and becomes part of what is given to the son." The Lord Justice then (1) makes certain remarks as to the effect of a hotchpot clause which I am not sure that I understand, if applied to a case where the estate is insufficient, as is the case here. Rigby L.J. is absolutely explicit on the point. Assuming the clause to apply to the 10,000*l.*, and the clause in this codicil obviously applies to the whole of these debts, Rigby L.J. says (2): "The respondents' case seems to me to rest entirely upon the assertion—and the mere assertion, for I have heard no reason, and confessedly there is no authority, to justify it—that the important words 'shall be taken in or towards satisfaction'—those are practically identical with the words here—"cannot be words of gift, but must be construed as meaning 'shall for the purpose of calculation only, and not by way of bounty or gift, be taken in or towards satisfaction.' I can see no justification whatever for modifying the phrase under consideration in so vital a manner." Then the Lord Justice goes on (3): "When a testator gives a direction that a particular thing shall be taken by any one in or towards satisfaction of his share, and the thing spoken of exists and belongs to the testator, I cannot doubt that, according to the plain and obvious meaning of the words, he gives that thing to the legatee, and this plain meaning is not controlled or varied, but is rather corroborated, by the addition of such words as, 'and shall be brought into hotchpot and accounted for accordingly.' If, and so far as, the testator cannot give, the words of gift must be inoperative in their primary meaning, though they may have a secondary meaning. Suppose a testator to have given money by way of bounty, say, for the education of a child. The money is spent and gone; the child is in no way liable to repay it; and it is impossible for the testator to make it the subject of a gift. Suppose, however, that the testator has lent a child money, say, 10,000*l.*, instead of giving it, and has, to make the transaction

(1) [1897] 1 Ch. 331.

(2) [1897] 1 Ch. 332.

(3) [1897] 1 Ch. 333.

clear, taken from the child a bond for repayment. Or, suppose ASTBURY J again, that he has lent the money to a stranger on mortgage. If the testator says, 'I declare that the money spent by me on my son's education shall be taken in or towards satisfaction of his share,' it is plain that, as to that particular subject-matter, there can be no gift." That is, of course, because the money had been spent. "In each of the other cases the 10,000*l.* is an existing asset"—that is the case of the debt—"of the testator, available for the payment of creditors, but, subject to their claims, entirely at the testator's disposal. If then he says, 'I declare that the 10,000*l.* owing to me on bond by my son, or the 10,000*l.* lent by me on mortgage to A., shall be taken in or towards satisfaction of my son's share under my will,' it would, in my judgment, be repugnant to common sense to say that the son was not released from the debt in the first case, and made the owner of the mortgage debt in the second. This, however, is the same thing as saying, that the words operate as words of gift."

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Now assuming that the clause there in question applied to the 10,000*l.*, I do not find anything in the judgment of the House of Lords conflicting with the views of the Lords Justices that I have just read. The difference in view between the House of Lords and the Court of Appeal is set out in Lord Macnaghten's judgment (1), but it does not, I think, affect those particular expressions of opinion by the Lords Justices.

I have been referred to Davidson's *Precedents*, 3rd ed. vol. iv. At p. 158 the author gives a form of the common hotchpot clause where advances have been made to children. Then he adds this: "The case where the advances constitute debts differs of course from the common case where they were in the nature of gifts, or having been originally loans, have ceased to be recoverable; since in the former case the debt would necessarily have to be brought into account without any provision for the purpose. This difference is not material where the shares in the residue are given absolutely, but becomes so where they are settled." Then he proceeds: "In that case there should either be a direction that the advances, so far as constituting debts, with or without the interest thereon to the

(1) [1898] A. C. 510, 512.

ASTBURY J. testator's death, shall be appropriated in part satisfaction of the shares of the debtor under the will, so as to keep alive the debt (in which case the operation of the will would be similar to the bequest in Precedent iii., page 108, of a debt in trust for the debtor and his issue), or else the debt should be forgiven, but directed to be brought into hotchpot as in the following form." He then gives a form providing for debts owing to the estate being brought into hotchpot as though they were advances, in which form the debt is released by the testator so as to be no longer charged, or claimed, as a debt owing to him or his estate, and then following upon that release a provision is made that it shall be brought into hotchpot as though it had been an advance in the usual way. A similar form appears in Key and Elphinstone's Precedents, 10th ed. vol. ii. p. 893.

In this position of affairs it remains to put a construction upon this particular will and codicil. The point turns entirely on the codicil, and the codicil does not contain the usual hotchpot clause. Whether that increases, or diminishes, the probability that a release of the debt was intended it is unnecessary, I think, to discuss. The testator having given to his son by his will certain specific and present gifts, and certain other gifts which are reversionary, and difficult to calculate the value of, directs that all advances lent by him to his son which shall remain owing at his decease, and all interest which may be owing on any such advances (that is the whole indebtedness, principal and interest, from the son to him at the date of his decease), shall be taken in full or in part satisfaction, as the case may be, of the legacies and various benefits given to his son under his will, provided that as to the joint debt of 4150*l.* the benefits under his will shall not be charged with a greater sum than 2100*l.*, part thereof. I think, having regard to the expressions of opinion, dicta though they may be, in *Limpus v. Arnold* (1), and to the very definite and clear statements made by Lindley L.J. and Rigby L.J. in *In re Cosier* (2), I have no alternative but to decide that the words "shall be taken in full or in part satisfaction" of the benefits under the will amount to a gift to the son of his indebtedness, and are sufficient to involve a bequest to him of the difference,

(1) 13 Q. B. D. 246; 15 Q. B. D. 300.

(2) [1897] 1 Ch. 325.

if any, between the two amounts in the event of the debts ASTBURY J. exceeding the benefits bequeathed to him by the will.

That being so, the answer to the first question in the summons must be in the negative.

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Solicitors: *Trollope & Winckworth; Drake, Son & Parton.*

G. R. A.

In re CONNELL'S SETTLEMENT.

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In re BENETT'S TRUSTS.

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FAIR v. CONNELL.

March 24, 25.

[1914 C. 1746.]

Trust — Resulting Trust — Property settled by Father on his Daughter's Marriage—Subsequent Bequests by Father on the Trusts of the Settlement.

By a settlement made in 1881 on the marriage of M., the daughter of B., to C., after reciting that C. and B. were respectively entitled to certain funds, and that B. had transferred from his own funds to the trustees a sum of 1670*l*. Consols to be held as part of "the trust estate hereby constituted," C. and M. respectively assigned their own funds to the trustees upon the trusts thereafter declared. The settlement then declared that the trustees should hold "all the trust estate hereby constituted" until the marriage upon trust for the persons to whom the same respectively then belonged; and after the marriage to pay the income of C.'s fund to him during the joint lives of C. and M.; and as to the 1670*l*. Consols and M.'s fund to pay the income to M. during the same joint lives; and after the death of either C. or M. to pay the income of "all the trust estate hereby constituted" to the survivor for life; and after the survivor's death upon trust as to corpus for the children of the marriage. In default of there being a child of the marriage, C.'s fund was to belong to him, and the 1670*l*. Consols and M.'s fund, if M. died in the lifetime of C., were to be held in trust for such persons as she should appoint, and in default of appointment to the persons who, if she had died intestate and unmarried, would have been entitled to her personalty under the Statutes of Distribution; but there was no declaration of trust as to these two funds in case of C. dying in the lifetime of M. and there being no child of the marriage. B., in the lifetime of C. and M., made a will whereby he declared that his trustees should stand possessed of one fourth of his residuary estate, "hereinafter referred to as M.'s share," upon trust to transfer the same to the trustees of her settlement, to be held by them upon the trusts by that settlement declared concerning "the fortune brought in

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settlement by or on behalf of M." C. died in the lifetime of M., and there was no child of their marriage. It was conceded that as regarded the fund which belonged to M. and was settled by her there was a resulting trust in her favour:—

Held, (1.) that as regarded the 1670*l.* Consols there was a resulting trust (subject to the life interest of M.) in favour of B., the father; but (2.) that the fourth share of his residue had been completely severed from B.'s estate and given to M.'s trustees for her benefit, and that there was an ultimate trust of this share in favour of M.

In re Donnelly's Estate [1913] 1 I. R. 177 followed as to (1.).

Principles of Lassence v. Tierney (1849) 1 Mac. & G. 551 applied as to (2.).

By an indenture dated July 5, 1881, and made between Arthur K. Connell of the first part, Margaret Waring Benett, spinster, of the second part, William Morgan Benett (the father of M. W. Benett) of the third part, and J. H. Allen and C. J. Connell (trustees) of the fourth part (being a settlement made on the marriage of A. K. Connell and M. W. Benett), after reciting certain documents under which the intended husband was entitled to property to be settled by him, and reciting that the intended wife was absolutely entitled to certain funds in reversion expectant on the deaths of her father and mother, it was recited as follows: "And whereas the said William Morgan Benett hath transferred from his own funds into or placed into the names of the "trustees "the sum of 1670*l.* 3*l.* per centum Reduced Bank Annuities to be held by them as part of the trust estate hereby constituted." Then followed a recital that on the treaty for the marriage it had been agreed that the intended husband's property (already specified), and all the part, share, and premises to which the intended wife was "entitled expectantly as aforesaid," and the sum of 1670*l.* stock, "shall be respectively settled in manner hereinafter contained." The deed then witnessed that the intended husband assigned his property to the trustees upon the trusts of the settlement. It further witnessed that in further pursuance of the agreement in that behalf and in consideration of the intended marriage the intended wife (with the approbation of the intended husband) assigned her reversionary interest to the trustees "Upon and subject to the trusts and provisions hereinafter declared and contained concerning the same." The deed then declared that the trustees

should stand possessed of "all the trust estate hereby constituted SARGANT J.
 Upon, under and subject to the trusts, powers, and provisions 1915
 hereinafter declared and contained (that is to say) until the CONNELL'S
 solemnization of the said now intended marriage, upon trust for SETTLEMENT,
 the persons to whom the same respectively now belong or *In re.*
 belonged before the execution hereof And from and imme- BENETT'S
 diately after the solemnization thereof then," as to the intended TRUSTS,
 husband's settled fund, upon trust to pay the income to him *In re.*
 during the joint lives of himself and the intended wife, "and as FAIR
 to the said sum of 1670*l.* . . . annuities and the premises hereby v.
 assigned by the said Margaret Waring Benett, as and when the CONNELL.
 same shall come into possession," upon trust to pay the income
 to her during the same joint lives, and after the death of either
 husband or wife then "as to all the trust estate hereby constituted
 as and when the same respectively shall be or shall come into
 possession" upon trust to pay the income to the survivor for
 life, and after the decease of such survivor upon trust as to the
 corpus for the children and issue of the marriage. The deed
 then provided that if there should be no child of the marriage
 who or whose issue should become absolutely entitled under the
 trusts (which actually happened), then as to the husband's
 property in trust for him, and as to the 1670*l.* stock and the
 reversion assigned by the intended wife "if she the said M. W.
 Benett shall die in the lifetime of the said A. K. Connell Upon
 trust for such person or persons and in such manner as she
 shall by her will or any codicil thereto, notwithstanding coverture,
 appoint, and in default of and subject to any such appointment,
 Upon trust for such person or persons as at the time of her
 decease would be entitled to her personal estate under the
 Statutes for Distribution of the Personal Estate of Intestates in
 case she had died intestate without having been married, and if
 more than one in the like shares and proportions in which they
 would be so entitled."

Mrs. Connell in fact survived her husband, but the settlement contained no declaration of the trusts which were to attach to the reversion settled by her and the 1670*l.* stock in the event of such survival, and there being no child of the marriage.

The will of William Morgan Benett, which was made during

SARGANT J. the joint lives of Mr. and Mrs. Connell, namely, on August 2, 1915 1890, contained the following bequest (which was afterwards
 CONNELL'S revoked by codicil): "I bequeath to the trustees or trustee for the
 SETTLEMENT, time being of the settlement made on the marriage of my daughter
In re. Margaret Waring Connell the sum of 2502*l.* 15*s.* per centum
 BENETT'S Consolidated Stock, free of legacy duty, which sum of stock I
 TRUSTS, hereby direct my trustees or trustee to transfer into or purchase
In re. in the names or name of the said trustees or trustee of the said
 FAIR settlement. And I declare that the same trustees or trustee shall
v. stand possessed of the said sum of 2502*l.* 15*s.* stock, when
 CONNELL. so transferred into or purchased as aforesaid, Upon the trusts and
 with and subject to the powers and provisions by and in the said
 settlement declared and contained of and concerning the stocks,
 funds and securities constituting or representing the fortune
 brought into settlement by or on behalf of the said Margaret
 Waring Connell." The testator also gave his residuary estate to
 his trustees, and declared that "from and after the death of my
 wife my trustees or trustee shall stand possessed of one equal
 fourth part (hereinafter referred to as Margaret Waring Connell's
 share) of the said residuary trust funds," after raising certain
 sums, "Upon trust to transfer or pay the same unto the trustees
 or trustee for the time being of the said settlement made on
 the marriage of the said Margaret Waring Connell, to be held by
 them or him upon the trusts and with and subject to the powers
 and provisions by and in the same settlement declared and
 contained of and concerning the stocks, funds and securities con-
 stituting or representing the fortune brought into settlement by
 or on behalf of the said Margaret Waring Connell." Under later
 parts of the will, in certain events other parts of the residuary
 estate were to be held by the testator's trustees "Upon the trusts
 hereinbefore declared of Margaret Waring Connell's share." These
 stood on the same footing as the stock to be transferred to the
 trustees of her settlement.

By a codicil dated January 6, 1891, the testator revoked the gift of 2502*l.* 15*s.* stock to the trustees of Mrs. Connell's settlement, and gave "my said daughter a legacy of 2500*l.* sterling for her own use and benefit."

The testator died on October 25, 1891, and A. K. Connell died

on March 7, 1914, leaving Margaret W. Connell his widow. In 1902 Robert H. Fair was appointed a trustee of the settlement in the place of a trustee who had died, and, the other original trustee having also died, he was now sole trustee of the settlement.

Fair took out an originating summons against Mrs. Connell, A. H. B. Allen and P. H. Martineau (trustees of the will), W. C. Benett (one of the testator's next of kin), and Newton Benett (since deceased) and Sarah Benett (beneficiaries under the will), raising (inter alia) the question whether, on the true construction of the settlement and in the events which had happened, of A. K. Connell having died in his wife's lifetime and of no child of the marriage having been born, and having regard to the terms of the will, all or any of (a) the reversionary interest settled by Mrs. Connell, (b) the 1670*l.* stock settled by the testator, (c) the fourth share of residue by the will directed to be transferred to the settlement trustees, and (d) the other shares of residue to be held upon the trusts declared of Mrs. Connell's share, belonged absolutely to Mrs. Connell, or whether any and if so which of such properties (subject to her life interest therein) formed part of the estate of her father, the testator.

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H. T. Methold, for the plaintiff, stated the facts and the questions involved.

Martelli, K.C., and *A. Andrewes-Uthwatt*, for the defendant Mrs. Connell. It is not disputed that, as regards the reversionary interest settled by Mrs. Connell, which was her own property, there is a resulting trust in her favour. She also claims that the 1670*l.* stock brought into the settlement by her father, so far as it is not exhausted by the trusts thereof, belongs to her, and that she is also absolutely entitled to the fourth share of residue by her father's will directed to be transferred to the trustees of the settlement, and, subject to the prior trusts of the will, to the beneficial interests which later on in the will are to be held on the trusts thereinbefore declared of Mrs. Connell's "share." We say that these funds are part of the daughter's portion. The words in the settlement "the trust estate hereby constituted" apply to everything settled by Mrs. Connell or her father, and show that

SARGANT J, it was intended to sever what the father settled from the rest of his estate and place it in the same position as property already belonging to Mrs. Connell and settled by her.

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The reference in the will to "Margaret Waring Connell's share" and giving that upon the trusts of the settlement show that the settlement was regarded as a complete disposition of her fortune or portion.

There is little, if any, English authority on the point to be found, but there are several Irish cases. Where a father on his daughter's marriage paid a sum of money to the trustees of her marriage settlement upon certain trusts which omitted, as in this case, to provide as to corpus for the event of the husband dying in his wife's lifetime, and there were no children of the marriage, it was held that the sum paid by the father was a marriage portion given by him to his daughter as a provision for her, and that there was a resulting trust in her favour: *Doyle v. Crean*. (1) There the Court followed the principle laid down by Sir Edward Sugden, when Lord Chancellor of Ireland, in *Ward v. Dias*. (2) The latter case was also followed in *Dennehy v. Delany*. (3) The only English case is *In re Nash's Settlement* (4), before Kay J., who held that there was a resulting trust for the father-settlor, but the earlier cases were not in that case cited to the Court. In *In re Donnelly's Estate* (5) Holmes L.J. says: "I am of opinion that when a father settles property on his daughter as a fortune or portion on her marriage, and, by reason of the trusts being only partially stated, a resulting trust arises, such trust is prima facie in favour of the daughter and not of the father."

Bryan Farrer, for all the other defendants except W. C. Benett. The sum paid by the father to the trustees of the settlement and all the moneys bequeathed by his will on the settlement trusts belonged to the father subject to Mrs. Connell's life interest. To be able to hold that there is a resulting trust in favour of the daughter the Court must find an absolute gift to her, or a gift with restrictions on the mode of enjoyment to secure certain

(1) [1905] 1 I. R. 252.

(3) (1876) I. R. 10 Eq. 377.

(2) (1835) Ll. & G. t. Sug. 177.

(4) (1882) 51 L. J. (Ch.) 511.

(5) [1913] 1 I. R. 177, 187.

objects for her benefit, and the failure of such objects: *Lassence* v. *Tierney*. (1) If this cannot be done, the resulting trust is in favour of the father. The Irish cases are only valuable as showing what the Courts in Ireland have thought sufficient language to constitute such an absolute gift. In *Doyle v. Crean* (2) there was a sufficient indication that the father intended that the sum to be settled should be a gift to or provision for the daughter. In *Ward v. Dyas* (3) the sum was expressed to be "the marriage portion" of the daughter. In *Dennehy v. Delany* (4) the question turned on what was agreed on when the daughter married. *In re Donnelly's Estate* (5) shows that in each case the question is whether a different intention appears from the settlement or from other evidence.

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The gifts under the will stand separately. They are given upon the trusts of the settlement, and that contains no trust, as regards capital, in the events which have happened. The resulting trust in the case of these gifts is also in the father's favour. [He also referred to *Attorney-General v. Maule* (6); *Underhill on Trusts*, 7th ed. p. 170.]

Parton, for the defendant W. C. Benett. The sum settled by the father and the interests (except the absolute legacy taken by Mrs. Connell under his codicil) all came back, subject to her life interest, to his estate, and now belong to the next of kin, subject to the life interest. The previous Irish cases are discussed in *Attorney-General v. Biggs*. (7)

Martelli, K.C., in reply.

SARGANT J. The question in this case is as to the ownership of the capital of certain trust funds which were settled by and on behalf of Mrs. Connell on her marriage by a marriage settlement, and there is also a question as to the ownership of certain other trust funds which were subsequently given in words referring to the settlement, under the will of her father, Mr. William Morgan Benett.

(1) 1 Mac. & G. 551.

(4) I. R. 10 Eq. 377.

(2) [1905] 1 I. R. 252.

(5) [1913] 1 I. R. 177.

(3) Ll. & G. t. Sug. 177.

(6) (1886) 56 L. T. 611.

(7) [1907] 2 I. R. 400.

SARGANT J. The trusts of the settlement, which is a somewhat complicated document, stand thus. First of all come recitals as to various interests to which the intended husband is entitled; then there is a recital of a reversionary interest to which the intended wife is entitled, and then there is this recital: "And whereas the said William Morgan Benett"—who was the father of the lady—"hath transferred from his own funds into or placed into the names of the trustees the sum of 1670*l*." Consols "to be held by them as part of the trust estate hereby constituted." Then follows the ordinary recital as to the agreement for settlement on the marriage, and then, in the witnessing part of the document, there is first an assignment by the husband of his interests upon the trusts thereafter declared; then an assignment by the wife of her reversionary interest upon the trusts thereafter declared, and then a declaration that the trustees or trustee for the time being shall stand possessed of "all the trust estate hereby constituted" (which words include the interests assigned by the husband, the interest assigned by the wife, and the sum of Consols which had already been transferred by Mr. Benett) upon trust to pay the income of the husband's fund during the joint lives to the husband, and upon trust to pay the income of the interest assigned by the wife and of the Consols transferred by the father to the wife during the joint lives. The survivor takes the income of both funds; and then there are the usual trusts for the issue of the marriage. In default of issue, and subject to the life interests, the husband takes the absolute reversionary interest in the funds settled by him, and then, as regards the interest settled by the wife and the sum of Consols transferred by the father, there is an unfortunate and obviously inadvertent omission. As to these funds the settlement only provides for what is to happen in default of children and after the death of both the spouses in the event of the wife dying in the lifetime of the husband. There is no corresponding provision made for the event which in fact happened of the husband dying in the lifetime of the wife.

In the lifetime of both the husband and the wife the father made his will, which is dated August 2, 1890. By that will he made a provision of 2500*l*. Consols for Mrs. Connell on

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exactly the same lines as the provision which he made subsequently in the will as regards a fourth of the residue for her and I need not further refer to the terms of that gift. Then, after making a gift of residue and providing that it should be divided into fourth parts, the will proceeds as follows: "And I hereby declare that from and after the death of my wife my trustees or trustee shall stand possessed of one equal fourth part (hereinafter referred to as Margaret Waring Connell's share) of the said residuary trust funds . . . upon trust to transfer or pay the same unto the trustees or trustee for the time being of the said settlement made on the marriage of the said Margaret Waring Connell, to be held by them or him upon the trusts and with and subject to the powers and provisions by and in the same settlement declared and contained of and concerning the stocks, funds and securities constituting or representing the fortune brought into settlement by or on behalf of the said Margaret Waring Connell." Then by subsequent parts of the will there were settlements of other shares of residue and of certain pecuniary legacies, and with regard to those, in certain events which seem in one or two cases at any rate likely to happen, a certain share of those shares was to fall into the fund appropriated for Margaret Waring Connell. In each case it was to be upon the trusts thereinbefore declared with regard to her share. So that, as regards those subsidiary interests, exactly the same question arises as with regard to the fourth share of residue, and no distinction can be drawn or was attempted to be drawn during the argument. I think it is not immaterial to notice that in a codicil to the will dated January 6, 1891, the testator revoked the bequest in his will of 2500*l.* Consolidated Stock to the trustee or trustees of the settlement made on the marriage of his daughter Mrs. Connell and gave her a legacy of 2500*l.* sterling for her own absolute use and benefit instead of it.

The father, Mr. Benett, died some time ago, and the husband of Mrs. Connell died in the course of last year. There has been no issue of the marriage, and Mrs. Connell is now claiming certain interests by way of resulting trust; practically the claim is put on the doctrine of resulting trust. She is claiming the

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SARGANT J. reversionary interest settled by her marriage settlement, which
 1915 clearly goes to her by way of resulting trust, because it belonged
 CONNELL'S to her at the date of the settlement and the trusts were not
 SETTLEMENT, exhausted. She is also claiming the 1670*l.* Consols transferred
In re. by her father; thirdly, she is claiming the one fourth of residue
 BENETT'S which was set aside as her share to be paid to the trustees of
 TRUSTS, her marriage settlement on the trusts appropriated to the fund
In re. settled by or on her behalf; and, fourthly, she is claiming to be
 FAIR entitled, when those interests fall in, to the subsidiary interests
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First, as regards the claim of Mrs. Connell to the reversionary share specifically settled by her on her marriage no opposition is raised; it is recognized that, she having been the absolute owner of that property in remainder, and having settled it on trusts which are not exhausted, it necessarily follows, as a matter of law, that the beneficial interest undisposed of by the settlement remains hers or results to her.

The next question, a much more difficult question, is with regard to the sum of 1670*l.* Consols which was transferred to the trustees by her father on the occasion of the settlement. Here I feel the greatest possible difficulty in saying that there is a resulting trust for Mrs. Connell, for this reason, that it seems to me essential, for the purpose of a resulting trust, that the property in question at the time of the settlement or instrument should have been the property of the person who claims by way of resulting trust, that is to say, a resulting trust can only occur when an owner has transferred property to trustees, calling them trustees, either without declaring any trusts at all or without declaring exhaustive trusts. In those cases, as a matter of law, and altogether independent of any expressed intention, the whole beneficial interest, or the unexhausted beneficial interest as the case may be, is held to remain in or to result to the settlor in respect of his original ownership. That, as I understand it, is the only way in which a resulting trust arises. Here it seems to me to be essential, in order on that principle that a resulting trust shall arise for the benefit of Mrs. Connell, that there should have been something prior to or contemporaneously with the settlement transferring the ownership of

this sum of 1670*l.* Consols to her, or otherwise the condition that is essential to a claim of resulting trust has not arisen at all.

As a matter of fact the only reported English case which appears to deal with the matter is *In re Nash's Settlement* (1), which was a stronger case in favour of the claimant than the present, because there the marriage settlement recited that the father had agreed to give 3000*l.* as a marriage portion or fortune with his daughter, and there was an incomplete settlement of that sum. In that case Kay J. held that the resulting trust was a resulting trust for the father, who had been the owner of the 3000*l.* at the time of the settlement.

A large number of Irish cases were referred to, beginning with a decision of Lord St. Leonards, when Sir Edward Sugden, Lord Chancellor of Ireland, in the case of *Ward v. Dias* (2), and there what was settled by the father was a sum of 500*l.* as "the marriage portion" of the daughter, and it was settled by him as his daughter's "marriage portion," and the really crucial passage in Lord St. Leonards' judgment is this: "If you consider it merely as a dedication of the 500*l.* to the uses of the settlement, then the trusts are for the wife for life, remainder to the issue, as the husband and wife, or the survivor shall appoint, and in default of appointment to the issue equally; if there be no issue, then there is a resulting trust for the father. But if this sum is considered as a marriage portion, it is clear that there is a resulting trust for the daughter to whom the portion is given. My opinion is, that the 500*l.* is to be considered as a portion. The words of the settlement are, that 'in consideration of the said intended marriage, and of the sum of 500*l.*, the marriage portion of the said Mary Dias, to be paid to the uses, &c., &c.'" Then he says this: "If it had been paid there could have been no doubt that it was a marriage portion, which signifies a sum of money transferred from a parent to a child on marriage, and what is not disposed of by the settlement will result to the child. The father provides the portion and the child settles it." Now I think that is founded clearly on the hypothesis or the finding of fact that there had been a transfer by the parent to

(1) 51 L. J. (Ch.) 511.

(2) L. & G. t. Sug. 177, 179.

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SARGANT J. the child, and that the child, being the owner of the portion, had settled it on the marriage. If so, it is obviously entirely in accordance with what I have said as to its being necessary for a resulting trust that the person claiming should have been the owner of the property at the time of the occurring of the trust. Whether that has been a little extended in one or two subsequent cases in Ireland I do not think it is necessary for me to consider.

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The law is stated in a judgment of Holmes L.J. in *In re Donnelly's Estate* (1), and there he sums it up in this way: "Before referring to the terms of the settlement, I desire to say a few words on a proposition that has been much referred to during the argument. I am of opinion that when a father settles property on his daughter as a fortune or portion on her marriage, and, by reason of the trusts being only partially stated, a resulting trust arises, such trust is *prima facie* in favour of the daughter and not of the father. I understand this to be the principle laid down in *Ward v. Dyas* (2) by Sir Edward Sugden when Lord Chancellor of Ireland, in 1835, and followed in several subsequent cases in this country; and I wish it to be understood that I cast no doubt on these authorities." There, although the learned Lord Justice uses the phrase "when a father settles property on his daughter as a fortune or portion on her marriage," I think he must be understood to mean that which Lord St. Leonards expressed in *Ward v. Dyas* (2), namely, that the transaction is really a gift by the father of a portion to his daughter and a settlement by the daughter of that portion. In the present case, when I look at the settlement, I am unable to find anything sufficient to indicate, and certainly nothing expressed, that there was at the time of this settlement a gift by the father to the daughter of this sum of Consols and a subsequent or contemporaneous settlement by the daughter of the sum. It seems to me that throughout the recitals of the settlement are very carefully drawn, as is the habit of modern conveyancers, so as in no way to prejudice or affect the trusts that are subsequently declared. Throughout the recitals merely lead up to the operative part, and do not go

(1) [1913] 1 L. R. 177, 187.

(2) Ll. & G. t. Sug. 177, 179.

beyond this, that this sum was to be held as part of "the trust estate hereby constituted," that is part of a trust estate consisting of three items to which I have referred, first, the property settled by the husband, secondly, the property settled by the wife, and, thirdly, the sum of 1670*l.* Consols transferred by the wife's father, and I can find nothing which in any way goes beyond this, namely, that the trustees are to hold the trust property upon the several trusts expressed in the indenture itself.

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Now as regards the last two items, the property settled by the wife and the 1670*l.* Consols brought in by the father, the trusts are unfortunately deficient, and the result seems to me to follow that there is, therefore, a resulting trust for the person who was at the time of the settlement the owner of the property, and that that person was in fact, as regards the 1670*l.* Consols, the lady's father and not the lady herself. I do not think that I can use, to supplement the settlement, the expression used by the father, Mr. Benett, in his subsequent will, when he speaks of the fortune settled by or on behalf of his daughter. And even if I could, I do not think that any different result would follow, because it would be quite true to talk of this 1670*l.* as a fortune settled on behalf of the daughter without in any way indicating that the trusts were necessarily to be exhaustive.

I now turn to the question of the interests coming to the daughter under her father's will, and, with regard to that, I simplify the matter by considering solely the fourth of residue which was given to her by the will, since the other settled shares stand on precisely the same footing. Now here I am of opinion that, so far as you are to seek the destination of this fund in the words of the settlement itself as referentially incorporated in the will, the same result must follow as in the case of the fund settled by the settlement. But I do not think that I am limited to those words. I must also look at the expressions in the will. And on doing so I find, not only that the testator has severed the fourth share of residue from his estate by directing its transfer to the trustees of his daughter's settlement, but that he has labelled it as her share, and has provided that it is

SARGANT J. to be held on the trusts of the fortune settled by or on behalf of the daughter, thus drawing no distinction between the funds which were settled by her and those which were settled by him.

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Under these circumstances I have to consider whether the case falls within the first branch of the two alternatives stated by Lord Cottenham L.C. in the case of *Lassence v. Tierney* (1) in the following passage, namely: "If a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee—upon failure of such objects, the absolute gift prevails; but if there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having in such event been given away from it." Now in most, if not all, of the cases in the books this question has had to be determined on the words of one instrument only, namely, the will itself; and I have not found or had my attention called to any case quite like this. But I see no reason why the principles stated in *Lassence v. Tierney* (1) should not apply to the conjoint effect of two instruments as much as to a single instrument. And indeed I can hardly imagine that a testator could express more definitely an intention of severing a share of residue and giving it completely away from his estate than by directing its transfer to the trustees of another instrument.

On the whole, though the case may be near the line, I am of opinion, within the words of *Lassence v. Tierney* (1), that the testator sufficiently indicates an intention to leave a fourth share of residue to Mrs. Connell "absolutely as regards his estate"; and that by giving it to the trustees of her settlement rather than to her he merely "restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee." And accordingly I hold, as regards the one fourth share which comes under the head (c) in the summons and also as regards the other reversionary interests which come under the head (d), that they will belong, if and when they fall into possession,

(1) 1 Mac. & G. 551, 561.

to Mrs. Connell and will not form part of the estate of Mr. SARGANT J. Benett.

Solicitors for plaintiff and the defendant M. W. Connell: *Foyer & Co.*

Solicitors for the defendant W. C. Benett: *Rose, Johnson & Hicks.*

Solicitors for the other defendants: *Martineau & Reid.*

F. E.

[Compare *In re Currie's Settlement* [1910] 1 Ch. 329.—F. E.]

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[1914 H. 3037.]

Company—Articles—Contract—Action by Member to enforce his Ordinary Rights—Arbitration Clause—Application by Company to stay—Sufficient Submission—Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 4, 27—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 14, sub-s. 1.

The true interpretation of the apparently conflicting decisions and dicta on s. 16 of the Companies Act, 1862 (25 & 26 Vict. c. 89), re-enacted by s. 14, sub-s. 1, of the Companies (Consolidation) Act, 1908, is that though articles of association can neither constitute a contract between a company and an outsider, nor give any individual member special contractual rights beyond those of the members generally,—*Pritchard's Case* (1873) L. R. 8 Ch. 956; *Melhado v. Porto Alegre Ry. Co.* (1874) L. R. 9 C. P. 503; *Eley v. Positive Life Assurance Co.* (1876) 1 Ex. D. 20, 88; *Browne v. La Trinidad* (1887) 37 Ch. D. 1—they do in fact constitute a contract between a company and its members in respect of their ordinary rights as members.

Observations in *Imperial Hydropathic Hotel Co., Blackpool v. Hampson* (1882) 23 Ch. D. 1, 13; *Johnson v. Lyttle's Iron Agency* (1877) 5 Ch. D. 687, 693; *Bradford Banking Co. v. Briggs* (1886) 12 App. Cas. 29, 33; *Wood v. Odessa Waterworks Co.* (1889) 42 Ch. D. 636, 642; *Salmon v. Quin & Axtens, Ltd.* [1909] 1 Ch. 311, 318; *Welton v. Saffery* [1897] A. C. 299, 315; and *Bisgood v. Henderson's Transvaal Estates* [1908] 1 Ch. 743, 759, followed and applied.

An article providing for the reference of disputes to arbitration is a

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sufficient submission in writing within the Arbitration Act, 1889, ss. 4, 27.

Baker v. Yorkshire Fire and Life Assurance Co. [1892] 1 Q. B. 144 applied.

SUMMONS.

The above company was registered on April 23, 1895, as an association not for profit.

Its objects were (inter alia): (a) "The encouragement of the breeding of Kent or Romney Marsh sheep at home and abroad, and the maintenance of the purity of the breed." (b) "The establishment and publication of a flock book of recognised and pure-bred sires which have been used, or ewes which have been bred from, and of such other flock books (if any) which the council may think fit, and the annual registration of the pedigrees of such sheep as are proved to the satisfaction of the council to be eligible for entry."

The articles provided as follows:—

Article 5. "The subscribers of the memorandum and articles of association, and such other persons as shall be admitted in accordance with these articles, and none other, shall be members of the association, and be entered on the register as such."

Article 9 imposed an entrance fee and an annual subscription and provided that the annual subscription should be payable on January 1 in each year unless the member "shall give three months' notice in writing to the secretary, before that date, of his intention to withdraw from the association."

Article 10. "Every member shall observe all lawful bye-laws, regulations, and orders of the council, for the government and work of the association"

Article 11. "Any member who shall fail in the observance of any lawful regulation of the association, or of any lawful bye-law, regulation, or order of the council, may be excluded from the association"

Articles 31 to 40 contained provisions as to the constitution and election of the council and officers, and article 41 provided that the management of the business of the association should be vested in the council.

Article 42. "In furtherance, and not in limitation, of the

general powers conferred by or implied in the preceding articles, it is expressly declared that the council shall have power to exercise and perform the following acts and duties:—

“(e) To publish such information and to hold such meetings for communication of discoveries and information as the council may deem expedient for the purposes defined in the memorandum of association.

“(f) To receive subscriptions yearly or otherwise from persons wishing to aid the objects of the association, but without admitting such persons to any of the rights of members, except (if the council think fit) the right of receiving all or some of the publications of the association free of charge.

“(g) To fix the amount of the annual subscription, and to make bye-laws and regulations for the government and work of the association, and for shows held by or in connection therewith, to be observed by the members of the association. Provided that no bye-law or regulation shall be made under this power which would amount to such an addition to or alteration of the articles as could only legally be made by a special resolution.

“(h) To impose such reasonable fines, forfeitures, and penalties (including suspension of privileges and incapacity to vote at meetings) for breach of the rules, regulations, and conditions contained in these articles, or to be made by the council in pursuance thereof, as they think proper, provided that no fine or pecuniary forfeiture or penalty shall exceed the sum of 5*l*.

“(i) To make such regulations as to the entry and registration of sheep in the flock book as they think proper.

“(k) To appoint and remove the secretary, clerks, and other officers, fix their salaries (if any) and duties, and require security if they think proper.

“(l) Subject to the regulations contained in the memorandum of association which relate to the conditions and regulations imposed by the Board of Trade, and to these articles, to dispose of the funds of the association for the promotion of the objects thereof, and in the first place to pay the costs, charges, and expenses preliminary and incidental to the promotion, formation, establishment, and registration of the association.”

ASTBURY J. Article 45 provided that minutes of every meeting of the association and of the council should be recorded, and should be prima facie evidence of the matters stated therein.

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Article 48. "The members of the council and other officers for the time being of the association shall be indemnified out of the funds of the association against all costs, charges, losses, damages, and expenses which they shall respectively incur or be put to on account of any contract, act, deed, matter, or thing which shall be made, done, entered into, or executed by them respectively on behalf of the association, and they shall be reimbursed by the association all reasonable expenses incurred by them in or about any legal proceedings or arbitration on account of the association, or otherwise in the execution of their respective offices, except such costs, losses, and expenses as shall happen through their respective wilful neglect or default;"

* Article 49. "Whenever any difference arises between the association and any of the members touching the true intent or construction or the incidents or consequences of these presents or of the statutes, or touching anything then or thereafter done, executed, omitted, or suffered in pursuance of these presents or of the statutes, or touching any breach or alleged breach of these presents, or any claim on account of any such breach or alleged breach, or otherwise relating to the premises or to these presents, or to any statute affecting the association, or to any of the affairs of the association, every such difference shall be referred to the decision of an arbitrator to be appointed by the parties in difference, or, if they cannot agree upon a single arbitrator, to the decision of two arbitrators, of whom one shall be appointed by each of the parties in difference, or an umpire to be appointed by the two arbitrators. And upon every or any such reference the costs of and incident to the reference and award respectively shall be in the discretion of the arbitrators or umpire respectively, who may determine the amount thereof, or direct the same to be taxed as between solicitor and client or otherwise, and may award by whom and to whom and in what manner the same shall be borne and paid; and such decision shall be made an order of the High Court of Justice upon the application of either party."

On November 11, 1905, the plaintiff sent in the following application for membership and flock entry:—

"I Alfred J. Hickman of Court Lodge Egerton in the county of Kent am desirous of becoming a member of the 'Kent or Romney Marsh Sheep-Breeders' Association' (Incorporated) as a flock owner and I engage, when elected, to pay the entrance fees, annual subscription, and such fees for entry of ewe flocks and individual sheep, as may then be in force or subsequently adopted, together with all such costs for inspection and tattooing as may be sanctioned by the council for the time being, and to conform to the rules and regulations of the association, until I, by notice in writing to the secretary, cease to be a member of the association.

"Alfred J. Hickman."

On December 12, 1905, the plaintiff was duly elected a member, and on December 14, 1905, written notice of his election was sent by the secretary with an intimation that his flock would be inspected. The inspection took place in May, 1906.

On December 18, 1914, the plaintiff issued a writ against the association and Chapman claiming: 1. An injunction to restrain the association from employing Chapman as secretary, and to restrain Chapman from acting as secretary. 2. An injunction to restrain the defendants from taking any steps to expel the plaintiff from the association. 3. An injunction to restrain the defendants from doing any acts in derogation of the plaintiff's rights as a member. 4. A declaration that the plaintiff was entitled to have the resolutions and proceedings of the association and of any committee thereof truly and accurately entered in the minutes, and consequential relief. 5. An injunction to restrain the defendants from incorrectly recording such resolutions in the minutes. 6. An order that all minutes be expunged which did not accurately record the proceedings of the association, and in particular that the entry be expunged stating that a certain committee appointed to inspect the plaintiff's sheep and to see that they were tattooed was appointed on Chapman's motion and not on the plaintiff's motion. 7. An injunction to restrain Chapman from calling any meeting of the association except in accordance with the rules. 8. Damages for unlawfully refusing to register the plaintiff's sheep and a

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ASTBURY J. declaration that the plaintiff was entitled to have his sheep registered. 9. Further or other relief. 10. Costs.

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On January 12, 1915, the defendants issued a summons asking that all further proceedings in the action be stayed pursuant to s. 4 of the Arbitration Act, 1889, and that the matters in question in the action be referred to arbitration in accordance with the provisions of article 49, or alternatively under the submission to arbitration contained in the plaintiff's written application for membership dated November 11, 1905, and duly accepted by the association on December 12, 1905, notice of such acceptance having been given to the plaintiff by letter of December 14, 1905. The alternative ground of submission to arbitration was added by amendment on March 12, 1915.

Micklem, K.C., and *Frederick Hinde*, for the defendants. The plaintiff is merely seeking to enforce his ordinary rights as a member. That is directly within the arbitration clause (article 49). The burden is on the plaintiff to show why the dispute should not be referred, and, as he has filed no evidence, the action ought to be stayed under the Arbitration Act, 1889, s. 4: *Willesford v. Watson* (1); *Hodgson v. Railway Passengers Assurance Co.* (2) It was suggested in chambers that there was a difficulty owing to the joinder of Chapman, a non-member, but he is only joined *virtute officii*, and he is a proper defendant. There is nothing in this point.

Hon. Frank Russell, K.C., and *Harold S. Simmons*, for the plaintiff. We do not rely on the joinder of Chapman, and for the purposes of our argument the action may be treated as an action against the association alone. The defendants, purporting to be parties to a submission to arbitration, seek to stay the action under the Arbitration Act, 1889, s. 4. But under s. 27 "submission" means "a written agreement" to refer differences to arbitration. Where is this written agreement? The defendants rely on article 49. But that is not an agreement between the plaintiff and the association. Articles are only a contract between the members *inter se*, and not between the members

(1) (1873) L. R. 8 Ch. 473, 480.

(2) (1882) 9 Q. B. D. 188.

and the company: Companies (Consolidation) Act, 1908, s. 14, sub-s. 1; *Pritchard's Case* (1); *Melhado v. Porto Alegre Ry. Co.* (2); *Eley v. Positive Life Assurance Co.* (3); *Browne v. La Trinidad* (4); Buckley on Companies, 9th ed. pp. 27, 51, 206; Lindley on Companies, 6th ed. p. 456. The same point was recognized in *Borland's Trustee v. Steel Brothers & Co.* (5) and *In re Famatina Development Corporation.* (6)

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Again the written agreement to submit to arbitration must be signed by both parties—*Caerleon Tinplate Co. v. Hughes* (7)—just as in the case of a written agreement under the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), s. 4: *In re Lewis.* (8) See also Halsbury's Laws of England, vol. i. p. 441, note (n). Now under s. 14, sub-s. 1, of the Companies (Consolidation) Act, 1908, the articles bind the company and the members to the same extent as if they had been signed and sealed by each member and contained covenants on the part of each member to observe them. But there is no provision that they are to be deemed signed by the company. In any case the section, which is merely a re-enactment of the Companies Act, 1862, s. 16, cannot mean that the articles are to be treated as signed either by the company or the members within the Arbitration Act, 1889, s. 27. No doubt, if the articles constituted an agreement signed by the association, the plaintiff by suing on them would affirm them as his contract, just as in the case of an action by the assured on a policy signed only by the assurers: *Baker v. Yorkshire Fire and Life Assurance Co.* (9), recognized by the Court of Appeal as an authority in *Morgan v. William Harrison, Ltd.* (10) But in the present case that initial element is wanting.

The plaintiff's application for membership and its acceptance by the association carry the matter no further. The application does not mention the articles, and non constat that the plaintiff knew of article 49. The rules and regulations mentioned in the application may well have referred to the by-laws, regulations,

(1) L. R. 8 Ch. 956, 960.

(2) L. R. 9 C. P. 503.

(3) 1 Ex. D. 20, 88.

(4) 37 Ch. D. 1.

(5) [1901] 1 Ch. 279, 288.

(6) [1914] 2 Ch. 271, 279.

(7) (1891) 60 L. J. (Q.B.) 640.

(8) (1876) 1 Q. B. D. 724.

(9) [1892] 1 Q. B. 144.

(10) [1907] 2 Ch. 137, 142.

ASTBURY J. and orders of the council mentioned (passim) in the articles, e.g., articles 10, 11, 42. In any case there is no agreement signed by the association, or any resolution authorizing the secretary to send the written notice of acceptance of the application.

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Micklem, K.C., in reply. The articles constitute a contract between a company and its members in respect of their ordinary rights as members: *Imperial Hydropathic Hotel Co., Blackpool v. Hampson* (1); *Bradford Banking Co. v. Briggs* (2); *In re Wheal Buller Consols* (3); *Wood v. Odessa Waterworks Co.* (4); *Welton v. Saffery* (5); *Salmon v. Quin & Axtens, Ltd.* (6); though, as decided in *Pritchard's Case* (7) and the other cases relied on by the plaintiff, they would not constitute a contract with an outsider, or give an individual member special contractual rights beyond those of the members generally: see *Palmer's Company Precedents*, 11th ed. pt. i. pp. 632—636. In *Borland's Trustee v. Steel Brothers & Co.* (8) the company, which required a transfer notice under the articles, was in fact the sole defendant. The case does not suggest that the articles were not binding as between the member and the company. In *In re Famatina Development Corporation* (9) O'Driscoll had gone outside the scope of his employment as a servant of the company, so that of course he could not rely on the indemnity article.

The plaintiff then objects that there is no written agreement signed by both parties. But the articles are the written agreement signed by the association, and by suing on them the plaintiff affirms them as his agreement: *Baker v. Yorkshire Fire and Life Assurance Co.* (10) In *Caerleon Tinplate Co. v. Hughes* (11) there was no agreement at all, as the parties were never ad idem.

If the articles alone are not a sufficient contract, we rely on the plaintiff's application and its acceptance. The plaintiff agreed to conform to the rules and regulations. Many of these would of course be contained in the articles: Companies

(1) 23 Ch. D. 1, 13.

(6) [1909] 1 Ch. 311, 318.

(2) 12 App. Cas. 29, 33.

(7) L. R. 8 Ch. 956.

(3) (1888) 38 Ch. D. 42, 46, 48.

(8) [1901] 1 Ch. 279.

(4) 42 Ch. D. 636, 642.

(9) [1914] 2 Ch. 271, 279.

(5) [1897] A. C. 299, 315.

(10) [1892] 1 Q. B. 144.

(11) 60 L. J. (Q.B.) 640.

(Consolidation) Act, 1908, s. 10. The notice of acceptance was obviously signed by the secretary as the association's agent. On both grounds therefore there was a sufficient submission to arbitration.

Cur. adv. vult.

March 31. ASTBURY J. This is a summons by the defendants to stay proceedings in the action pursuant to s. 4 of the Arbitration Act, 1889. The action is against the defendant association and their secretary Chapman, and the plaintiff, who became a member in 1905, claims certain injunctions and a declaration and other relief in respect of matters arising out of and relating solely to the affairs of the association. In substance he claims to enforce his rights under the association's articles. The secretary is not a member of the association, but the plaintiff admits that he is only sued *virtute officii*, and the plaintiff does not seek to resist this summons on the ground that the secretary is one of the defendants. [After stating the objects of the association and reading article 49 as to arbitration, his Lordship continued:] This is a common form of article in private companies, and the objects of this association being what they are, it and its members might be seriously prejudiced by a public trial of their disputes, and if this summons fails, as the plaintiff contends that it should, these arbitration clauses in articles are of very little, if any, value.

It is clear on the authorities that if there is a submission to arbitration within the meaning of the Arbitration Act, 1889, there is a *prima facie* duty cast upon the Court to act upon such an agreement: *Willesford v. Watson*. (1)

In the present case the defendants contend, first, that article 49, dealing as it does with the members of the association, in their capacity of members only, constitutes a submission within the meaning of the Arbitration Act, or, secondly, that the contract contained in the plaintiff's application for membership and the association's acceptance of it amounts to such a submission. The plaintiff contests both these propositions, and independently of the particular dispute in this case, the arguments, especially

(1) L. R. 8 Ch. 473, 480.

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ASTBURY J. upon the first of these contentions, have raised questions of far-reaching importance.

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I will first deal with the question as to the effect of article 49.

Sect. 14, sub-s. 1, of the Companies (Consolidation) Act, 1908, says: "The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member, his heirs, executors, and administrators, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act."

It is laid down in text-books of the highest repute that the articles are not a contract between the member and the company; that the articles are no contract with the company but a contract with the other members; and that the articles are a contract only as between the members inter se in respect of their rights as shareholders: Buckley on Companies, 9th ed. pp. 27, 51, 206; that the exact nature of this covenant, that is the covenant referred to in s. 14, has given rise to considerable discussion and is even now very difficult to define; but it is now settled that it is not equivalent to a contract between the company on the one part and the members on the other, on which either a member can sue the company or the company can sue a member: Lindley on Companies, 6th ed. p. 456. Other writers have formed a different conclusion, and the construction of the language of this section has long been the subject of controversy: Palmer's Company Precedents, 11th ed. pt. i. pp. 632—636; Hamilton's Company Law, 3rd ed. p. 219; Gore-Browne on Joint Stock Companies, 32nd ed. pp. 40, 41.

The principal authorities in support of the view that the articles do not constitute a contract between the company and its members are *Pritchard's Case* (1), *Melhado v. Porto Alegre Ry. Co.* (2), *Eley v. Positive Life Assurance Co.* (3), and *Browne v. La Trinidad.* (4)

In *Pritchard's Case* (1) the articles of association of a mining company provided that the company should immediately after

(1) L. R. 8 Ch. 956.

(2) L. R. 9 C. P. 503.

(3) 1 Ex. D. 20, 88.

(4) 37 Ch. D. 1.

incorporation enter into an agreement with De Thierry the vendor for the purchase of the mine for 2000*l.* and 3200 fully-paid shares. The articles were signed by the vendor and six other persons, and the directors allotted the 3200 shares to the vendor or his nominees, but no further agreement was made with him. It was held, affirming the decision of Wickens V.-C., that the articles of association did not constitute a contract in writing between the vendor and the company within s. 25 of the Companies Act, 1867 (30 & 31 Vict. c. 131), and that the shares could not therefore be considered as fully paid. Mellish L.J. in giving judgment said (1): "I am of opinion that the articles of association cannot be considered as a contract in writing between De Thierry and the company for the sale of the mine to them. It may, no doubt, be the case, if no other contract was entered into, and if De Thierry signed these articles and they were acted upon, that a Court of Equity would hold that as between him and the company—from their acting upon it—there was a binding contract; but in themselves the articles of association are simply a contract as between the shareholders inter se in respect of their rights as shareholders. They are the deed of partnership by which the shareholders agree inter se."

In *Melhado v. Porto Alegre Ry. Co.* (2) the articles of association of a joint stock company provided that the company should defray such expenses incurred in its establishment as the directors should consider might be deemed and treated as preliminary expenses to an amount not exceeding 2000*l.* The plaintiffs, who were promoters of the company, had incurred preliminary expenses in its establishment, but it was held that no action for these expenses would lie at the suit of the plaintiffs against the company under the articles. Lord Coleridge C.J. said: "The action is brought on a clause in the articles of association, by which the directors are authorized to pay certain expenses if they should consider them to be properly deemed preliminary expenses. The declaration avers that all conditions were performed necessary to entitle the plaintiffs to be paid their expenses; and therefore I think we must take it that they were expenses which, if the directors had thought proper to pay them, the articles

(1) L. R. 8 Ch. 960.

(2) L. R. 9 C. P. 503, 505, 506, 507.

ASTBURY J. would have justified them in paying. The question, therefore, is whether an action will lie for the payment of these expenses, in pursuance of the articles of association, to which the plaintiffs were not parties. I have come to the conclusion that no such action will lie—I must say somewhat reluctantly, because, though I wish to express no opinion on the merits of this particular case, having no materials for forming such an opinion, it does seem just, in general, if a company takes the benefit of the work and expenditure by which its existence has been rendered possible, and voluntarily comes into existence on the terms that it shall be liable to pay for such work and expenditure, that a cause of action should be given. I can find, however, no legal principle upon which such an action can be maintained. It appears to me that there is no contract between the plaintiffs and the defendants. The doctrine of ratification is inapplicable, for the reasons given in the judgments in *Kelner v. Baxter*.” (1) Mellor J. said: “The plaintiffs were not in any way parties to the articles of association, and there was not, therefore, any express contract to pay them.” Brett J. said: “There is no contract, in my judgment, of any sort upon which they can sue, and unless there be a contract of some sort between them and the company, I do not see that they can have any cause of action. No contract made with them before the existence of the company can be ratified by the company for the reasons pointed out in the case of *Kelner v. Baxter* (1), with which I fully agree.”

In *Eley v. Positive Life Assurance Co.* (2) the articles of association contained a clause in which it was stated that the plaintiff, a solicitor, should be the solicitor to the company and transact its legal business. The articles were registered and the company incorporated, and eleven months later the plaintiff became a member. The plaintiff was not appointed solicitor by any resolution of the directors, nor by any instrument bearing the seal of the company, but he acted as such for a time. Subsequently the company ceased to employ him and he brought an action for breach of contract against the company for not employing him as its solicitor. The first count of the declaration

(1) (1866) L. R. 2 C. P. 174,

(2) 1 Ex. D. 20, 88.

stated (1) that it was agreed by and between the plaintiff and the defendants that the plaintiff should be employed by the defendants as, and appointed by them to the office of, solicitor of the company. During the argument (2) it was contended that the contract declared on was not the contract purported to be contained in the articles. Amphlett B. said (3): "The articles, taken by themselves, are simply a contract between the shareholders inter se, and cannot, in my opinion, give a right of action to a person like the plaintiff, not a party to the articles, although named therein. If authority were wanted for this proposition, the cases cited in the argument, *Pritchard's Case* (4) and *Melhado v. Porto Alegre Ry. Co.* (5), are, in my opinion, quite conclusive on the subject." Subsequently he said (6): "For these reasons, I think that there was no contract at all between the plaintiff and the company to the effect stated in the declaration." Cleasby B. confined his judgment to the last points raised in the case and said (7): "I am of opinion that clause 118 of the articles cannot by itself be taken to operate as a contract between the solicitor and the company." Kelly C.B. said (7): "I forbear to pronounce any opinion as to whether these articles, with the fact of the subsequent employment, constitute a contract on the terms contained in them, because, were I to so hold, there would be a difficult question behind, whether it was not ultra vires for the directors to attempt to bind the company to employ a solicitor to transact, for all his life, all the legal business of the company. Passing by this, I come to consider the objection raised under the 4th section of the Statute of Frauds. I do not see how any one can doubt that this agreement was not to be performed within a year. It was for the life of the plaintiff, subject to a defeasance on the possibility of his being guilty of some misconduct. But, assuming, as I think we must, that this was not to be performed in a year, the question arises, whether there is any memorandum or note in writing of it signed by the defendants. The signatures affixed to

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(1) 1 Ex. D. 22.

(4) L. R. 8 Ch. 956.

(2) 1 Ex. D. 23.

(5) L. R. 9 C. P. 503.

(3) 1 Ex. D. 26.

(6) 1 Ex. D. 28.

(7) 1 Ex. D. 30.

ASTBURY J. the articles were alio intuitu, and it can hardly be suggested that the directors had any idea that, in signing the articles, they were signing a note of this contract."

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This case went to the Court of Appeal and Lord Cairns L.C. said(1): "I wish to say, in the first place, that in my opinion a contract of the kind suggested to exist in this case ought not to receive any particular favour from the Court. The statement is that Baylis was endeavouring to form a joint stock insurance company upon a new principle, and applied to the plaintiff to make advances to meet the expenses of getting up the company, and it was arranged between them that in the event of the company being formed the plaintiff should be appointed permanent solicitor to the company. That is to say, a bargain is made between a professional man and Baylis which, so far as the case is concerned, does not appear to have been communicated to those who were invited to join the company, that if the former will advance money for the formation of the company, he shall be appointed permanent solicitor, and the company shall be obliged to employ him as their professional adviser. When the articles are prepared, they are so by the plaintiff, and in them he inserts a clause which no doubt informs those who signed the articles of the arrangement, but does not appear to have been brought to the notice of those who joined from receiving circulars. This, I repeat, is not a proceeding which the Court would encourage in any way. I also wish to reserve my judgment as to whether a clause of this kind is obnoxious to the principles by which the Courts are governed in deciding on questions of public policy." Then a little lower down he said(1): "This case was first rested on the 118th article. Articles of association, as is well known, follow the memorandum, which states the objects of the company, while the articles state the arrangement between the members. They are an agreement inter socios, and in that view, if the introductory words are applied to article 118, it becomes a covenant between the parties to it that they will employ the plaintiff. Now, so far as that is concerned, it is res inter alios acta, the plaintiff is no party to it. No doubt he thought that by inserting it he was making his employment safe as against

(1) 1 Ex. D. 89.

the company; but his relying on that view of the law does not alter the legal effect of the articles. This article is either a stipulation which would bind the members, or else a mandate to the directors. In either case it is a matter between the directors and shareholders, and not between them and the plaintiff."

In *Browne v. La Trinidad* (1) before the formation of the company an agreement was entered into between B. and a person as trustee for the intended company, by which it was stipulated (inter alia) that B. should be a director and should not be removable till after 1888. The 6th clause of the articles provided that the directors should adopt and carry into effect the agreement with or without modification, and that subject to such modification (if any) the provisions of the agreement should be construed as part of the articles. The agreement was acted upon, but no contract adopting it was entered into between the plaintiff and the company. It was held that treating the agreement as embodied in the articles, still there was no contract between B. and the company that he should not be removed from being a director, the articles being only a contract between the members inter se, and not between the company and B. Cotton L.J. towards the end of his judgment said (2): "Assuming that an unlimited power is given to the meeting by article 91, ought we, having regard to the contract entered into by the memorandum of the 24th of November, 1884, and article 6, to interfere by injunction to restrain the company in general meeting from acting under that power? I do not give any opinion upon the question how far the Court would have interfered by injunction in order specifically to enforce an agreement between the company and the plaintiff that he should be an irremovable director. That point raises questions upon which I should not like to give any opinion without having them fully discussed. In my opinion we ought not to interfere in the present case, because there is no such contract between the plaintiff and the company. The memorandum of agreement of the 24th of November, 1884, is in no way a contract between the plaintiff and the company. It is said that it was adopted and incorporated into the articles, but I cannot accede to that. The company by its directors acted upon

(1) 37 Ch. D. 1.

(2) 37 Ch. D. 13.

ASTBURY J. the agreement, but that does not make it binding on the company.

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Then is it incorporated into the articles in such a way as to entitle the plaintiff to say I have such a contract between me and the company as can be enforced by a Court of law, and as I might enforce in equity by way of specific performance? That point is clearly settled, I think, by *Eley v. Positive Life Assurance Co.* (1) There two of the members of the Court of first instance held, and the other member did not express dissent, that the articles are merely a contract between the shareholders inter se, and that though a person in whose favour a stipulation is made in the articles may afterwards have shares allotted to him, he does not by that means become in the same position as if he had entered into a contract with the company." Lindley L.J. said (2): "Having regard to the construction put upon s. 16 of the Companies Act of 1862 in the case of *Eley v. Positive Life Assurance Co.* (1) and subsequent cases, it must be taken as settled that the contract upon which he relies is not a contract upon which he can maintain any action, either on the common law side or the equity side. There might have been some difficulty in arriving at that conclusion if it had not been for the authorities, because it happens that this gentleman has had shares allotted to him, and is therefore a member of the company. Having regard to the terms of s. 16, there would be some force, or at all events some plausibility, in the argument that, being a member, the contract which is referred to in the articles has become binding between the company and him. Of course that argument is open to this difficulty that there could be no contract between him and the company until the shares were allotted to him, and it would be remarkable that, upon the shares being allotted to him, a contract between him and the company, as to a matter not connected with the holding of shares, should arise."

Now in these four cases the article relied upon purported to give specific contractual rights to persons in some capacity other than that of shareholder, and in none of them were members seeking to enforce or protect rights given to them as members, in common with the other corporators. The actual decisions

(1) 1 Ex. D. 20, 88.

(2) 37 Ch. D. 14.

amount to this. An outsider to whom rights purport to be given by the articles in his capacity as such outsider, whether he is or subsequently becomes a member, cannot sue on those articles treating them as contracts between himself and the company to enforce those rights. Those rights are not part of the general regulations of the company applicable alike to all shareholders and can only exist by virtue of some contract between such person and the company, and the subsequent allotment of shares to an outsider in whose favour such an article is inserted does not enable him to sue the company on such an article to enforce rights which are *res inter alios acta* and not part of the general rights of the corporators as such. The language of some of the judgments appears, however, to go further, as recognized, for instance, by Sargant J. in *In re Famatina Development Corporation*. (1)

The wording of s. 14, sub-s. 1, of the Consolidation Act, which is in the same terms as s. 16 of the Companies Act, 1862, is difficult to construe or understand. A company cannot in the ordinary course be bound otherwise than by statute or contract and it is in this section that its obligation must be found. As far as the members are concerned, the section does not say with whom they are to be deemed to have covenanted, but the section cannot mean that the company is not to be bound when it says it is to be bound, as if, &c., nor can the section mean that the members are to be under no obligation to the company under the articles in which their rights and duties as corporators are to be found. Much of the difficulty is removed if the company be regarded, as the framers of the section may very well have so regarded it, as being treated in law as a party to its own memorandum and articles.

It seems clear from other authorities that a company is entitled as against its members to enforce and restrain breaches of its regulations. See, for example, *MacDougall v. Gardiner* (2), *Pender v. Lushington* (3), and *Imperial Hydropathic Hotel Co., Blackpool v. Hampson*. (4) In the last case Bowen L.J. said: "The articles of association, by s. 16, are to bind all the company

(1) [1914] 2 Ch. 271, 279.

(3) (1877) 6 Ch. D. 70.

(2) (1875) 1 Ch. D. 13.

(4) 23 Ch. D. 1, 13.

ASTBURY J. and all the shareholders as much as if they had all put their
 1915 seals to them.”

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It is also clear from many authorities that shareholders as against their company can enforce and restrain breaches of its regulations, and in many of these cases judicial expressions of opinion appear, which, in my judgment, it is impossible to disregard.

In *Johnson v. Lyttle's Iron Agency* (1), in an action by a shareholder against the company, James L.J. said: “The notice . . . did not comply strictly with the provisions of the contract between the company and the shareholders which is contained in the regulations of table A.”

In *Bradford Banking Co. v. Briggs* (2) the articles gave the defendant company a lien on its members' shares. The plaintiffs, who were equitable mortgagees of certain shares, brought an action against the mortgagors and the company to enforce their security. The company claimed priority for their lien. Lord Blackburn said: “The only one of the articles of association which I think it material to notice is the 103rd article, which is as follows:—‘The company shall have a first and permanent lien and charge, available at law and in equity, upon every share of every person who is the holder or one of several joint holders thereof, for all debts due from him, either alone or jointly with any other person, whether a shareholder or not in the company.’ John Faint Easby, a coal merchant, became a proprietor of a number of shares in the respondent company, and obtained certificates for them. This property in the shares was, by virtue of the 16th section of the Act already quoted, I think, bound to the company as much as if he had (at the time he became holder of these shares) executed a covenant to the company in the same terms as article 103, but I do not think it was bound any further.”

In *Wood v. Odessa Waterworks Co.* (3), which was an action by the plaintiff on behalf of himself and all other shareholders against the company, Stirling J. said: “The articles of association constitute a contract not merely between the shareholders

(1) 5 Ch. D. 687, 693.

(2) 12 App. Cas. 29, 33.

(3) 42 Ch. D. 636, 642.

and the company, but between each individual shareholder and every other."

In *Salmon v. Quin & Axtens, Ltd.* (1) Farwell L.J., referring to this last statement, said: "I think that that is accurate subject to this observation, that it may well be that the Court would not enforce the covenant as between individual shareholders in most cases."

In *Welton v. Saffery* (2) Lord Herschell, who dissented on the main question from the rest of the House, made the following general observation: "Sect. 16 of the Act of 1862 provides that the articles of association, when registered, shall bind the company and the members thereof to the same extent as if each member had signed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators to conform to all the regulations contained in such articles, subject to the provisions of this Act. The articles thus become in effect a contract under seal by each member of the company, and regulate his rights. They cannot, of course, diminish or affect any liability created by the express terms of the statute; but, as I have said, the statute does not purport to settle the rights of the members inter se, it leaves these to be determined by the articles (or the articles and memorandum together), which are the social contract regulating those rights. I think it was intended to permit perfect freedom in this respect. It is quite true that the articles constitute a contract between each member and the company, and that there is no contract in terms between the individual members of the company; but the articles do not any the less, in my opinion, regulate their rights inter se. Such rights can only be enforced by or against a member through the company, or through the liquidator representing the company; but I think that no member has, as between himself and another member, any right beyond that which the contract with the company gives."

In all these last mentioned cases the respective articles sought to be enforced related to the rights and obligations of the members generally as such and not to rights of

(1) [1909] 1 Ch. 311, 318.

(2) [1897] A. C. 299, 315.

ASTBURY J. the character dealt with in the four authorities first above referred to.

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It is difficult to reconcile these two classes of decisions and the judicial opinions therein expressed, but I think this much is clear, first, that no article can constitute a contract between the company and a third person; secondly, that no right merely purporting to be given by an article to a person, whether a member or not, in a capacity other than that of a member, as, for instance, as solicitor, promoter, director, can be enforced against the company; and, thirdly, that articles regulating the rights and obligations of the members generally as such do create rights and obligations between them and the company respectively.

In *Bisgood v. Henderson's Transvaal Estates* (1) Buckley L.J. said: "The purpose of the memorandum and articles is to define the position of the shareholder as shareholder, not to bind him in his capacity as an individual."

Sect. 4 of the Arbitration Act, 1889, says: "If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings." Then s. 27 says: "'Submission' means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not." The defendants' first contention is that article 49 is, on the authorities, a written agreement within the meaning of this Act.

In *In re Lewis* (2) it was held that a document containing the terms of an agreement as to the amount of costs payable by a

(1) [1908] 1 Ch. 759.

(2) 1 Q. B. D. 724, 726.

client to his solicitor, assented to by the client, but signed by the solicitor only, is not an "agreement in writing" within the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), s. 4. Lord Coleridge C.J. said: "It is quite clear that there was no agreement in writing within s. 4 of the Act"; and, later on, he says: "An 'agreement in writing' within s. 4 must be an agreement by both parties, and both parties must sign their names upon the agreement."

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In *Caerleon Tinplate Co. v. Hughes* (1), an action for the price of goods sold, the bought note signed by the defendants contained a provision for arbitration in case of dispute, whilst the sold note signed by the plaintiff contained no such provision. It was held that there was no submission within the meaning of the Act, for an agreement to submit to arbitration must be in writing and signed by both parties. *In re Lewis* (2) was referred to, and Denman J., referring to s. 27 of the Arbitration Act, said: "In my judgment there can be no written agreement unless in writing signed by the parties as their agreement, and that 'written agreement' means one in which the terms on both sides are reduced into writing. It is useless to discuss the documents here, for the bought and sold notes differ in the essential particular that the former contains a provision which is wholly absent in the latter." Then Wills J. said: "Supposing there were a contract, and the parties were ad idem,"—which in fact they were not in this case—"yet there was no submission under the Act unless there were an agreement in writing by both parties. *In re Lewis* (2) is conclusive on this point. In the present case the agreement is to be in writing under s. 27, and we must hold that both parties must sign their names to it; otherwise there might be a conflict of evidence, and a discussion as to what was understood by either party."

In *Baker v. Yorkshire Fire and Life Assurance Co.* (3) an action was brought on a fire policy which was executed in the usual way by the company but not by the assured, and it was held that the policy, though not signed by the plaintiff, amounted to a submission to arbitration within the meaning of the Act.

(1) 60 L. J. (Q.B.) 640, 641.

(2) 1 Q. B. D. 724.

(3) [1892] 1 Q. B. 144, 145.

ASTBURY J. Lord Coleridge C.J., who had been a party to the case of *In re*
 1915 *Lewis* (1), said: "The plaintiff sues on the policy, and by so
 HICKMAN suing affirms it to be his contract; he cannot disaffirm a part of
 KENT OR the very contract on which he is suing. He contends that in
 ROMNEY order to bring into operation the arbitration clause contained in
 MARSH the policy, the policy must be signed by both parties; but the
 SHEEP- Act of Parliament says nothing of the kind, and the only
 BREEDERS' apparent justification for the contention is to be found in
 ASSOCIATION. *Caerleon Tinplate Co. v. Hughes*. (2) That decision must be
 interpreted, however, with regard to the particular facts of that
 case. There was there no complete contract; the two documents
 constituting the contract differed materially in their terms, and
 the Court said it was plain that the parties never were *ad idem*." Then A. L. Smith J. said: "It is said, however, that by the
 interpretation clause a submission must be a written agreement
 to refer disputes to arbitration. This, however, is not a higher
 interpretation than was necessarily put on the language of the
 old Act, under which it was the universal practice to refer these
 cases, and does not mean that in all cases the written agreement
 to refer must be signed by both parties. It is quite unnecessary
 • to say more as to the decision in *Caerleon Tinplate Co. v. Hughes* (2)
 than that it turned entirely upon the peculiar facts of the case."

The result of these decisions is, I think, that if the submission is in writing and is binding on both parties as their agreement or as the equivalent in law to an agreement between them the statute is satisfied.

In the present case, the plaintiff's action is, in substance, to enforce his rights as a member under the articles against the association. Article 49 is a general article applying to all the members as such, and, apart from technicalities, it would seem reasonable that the plaintiff ought not to be allowed in the absence of any evidence filed by him to proceed with an action to enforce his rights under the articles, seeing that the action is a breach of his obligation under article 49 to submit his disputes with the association to arbitration, and if the case falls within the Act I see no reason for exercising my discretion under s. 4 in his favour.

(1) 1 Q. B. D. 724.

(2) 60 L. J. (Q.B.) 640.

In my judgment, article 49, for the reasons above referred to, ASTBURY J creates rights and obligations enforceable as between the plaintiff and the association respectively and those rights and obligations are contained in a written document, but whether that document is a contract or agreement between the plaintiff and the association within s. 27 of the Arbitration Act depends upon whether the decisions in *Eley v. Positive Life Assurance Co.* (1), and the other three cases of a similar character above referred to, ought to be regarded as only dealing with and applying to articles purporting, first, to contain an agreement with the company and a third person, or, secondly, to define the rights of a shareholder in some capacity other than that of a member of the company. To reconcile those decisions with the other expressions of judicial opinion above mentioned, some such view should, I think, be adopted and general articles dealing with the rights of members "as such" treated as a statutory agreement between them and the company as well as between themselves inter se, and, in my judgment, article 49 in the present case does constitute a submission to arbitration within the true meaning and intent of the Arbitration Act.

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Having regard, however, to the conclusion to which I have come on the second contention raised by the defendants, it is not necessary for me to base my decision upon this ground alone, and upon the opinion I have so expressed.

The defendants' second contention is that the contract contained in the plaintiff's application for membership, and the association's acceptance of it, amounts to a submission within the Act. [His Lordship stated the facts as to the plaintiff's application and election and continued:] In consideration of being elected a member and of his offer to join the association being accepted, the plaintiff contracted in writing with the association to conform to its rules and regulations. One of those regulations was a general submission to arbitration of all differences between the association and any of its members as such, amply wide enough to cover the matters in dispute in this action. The association at the date of the contract was already bound to each and all its

ASTBURY J. corporators to act in conformity with those regulations, and was
1915 at the date of the writ in this action, and has been since, ready
HICKMAN and willing to so act. It is submitted on behalf of the plaintiff
r. that at the date of this contract he may have known nothing
KENT OR about article 49, and that as the council of the association have
ROMNEY power under its articles to make further by-laws and regulations
MARSH as to certain matters therein referred to the plaintiff's offer may
SHEEP- have referred to these. The plaintiff has, however, filed no
BREEDERS' evidence in support of this, and the articles not only constitute
ASSOCIATION. the rules and regulations of the association but refer to the
rules and regulations of the association as contained in them,
and I am unable to accept this contention.

In my judgment, the contract so made between the plaintiff and the association is also a submission in writing within the true meaning and intent of the Arbitration Act, and I make an order to stay under s. 4 and direct that the matters in dispute in this action be referred to arbitration accordingly.

Solicitors: *Walters & Co.; Ernest Simmons & Co.*

G. R. A.

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Light Railway Company—Construction of Local and Personal Act—Statutory Contract between Railway and Navigation Companies—Section commencing “For the protection of the Navigation Company”—Clauses in Part for the Protection of the Public—Right of Contracting Parties to vary Contract—Right of Attorney-General to enforce Contract on Part of the Public.

By a Light Railway Order of the Light Railway Commissioners, confirmed by the Board of Trade under the Light Railways Act, 1896, a company incorporated by that Order was authorized to construct a light railway which was to be carried over a canal, then vested in a navigation company, by an opening or swing bridge.

Sect. 29 of the Order commenced “For the protection of the Navigation Company the following provisions shall have effect”; then followed a number of sub-sections which provided; among other things, (3.) that the Light Railway Company should carry the railway over the canal by an opening or swing bridge at a defined height with opening space of a defined width; (4.) make provision for opening the bridge for the passage of barges, boats, or other vessels at all times by night and day; (5.) maintain the waterway at a certain depth; (8.) exhibit proper lights every night; and provide and work proper signals to inform and warn persons using the canal during foggy weather when the bridge was closed; and (16.) “The company and Navigation Company may agree for any variation or alteration of the works in this section provided for or of the manner in which the same shall be executed.”

The undertaking of the Light Railway Company was afterwards vested in the North Eastern and Lancashire and Yorkshire Railway Companies as part of their joint undertaking. The joint companies had agreed with the Navigation Company that the swing bridge should be altered into a fixed bridge. The Attorney-General brought this action, at the relation of the owner of a number of keels and boats using the canal, to restrain the companies from making the alteration:—

Held, that as some of the provisions of s. 29 were clearly for the benefit of the public, the fact that it was stated to be inserted for the protection of the Navigation Company did not make it a mere contract between the companies which they could vary at pleasure, and the Attorney-General was entitled to bring the action for the protection of the public.

Held, also, that the proposed alteration was not an alteration of works within the meaning of sub-s. 16, and the injunction must be granted.

Decision of Astbury J. reversed. (1)

THIS action was brought by the Attorney-General at the relation of John Thomas Rusling, the owner or charterer of many

(1) Not reported.

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keels using the Stainforth and Keadby Canal, for an injunction restraining the defendants, the North Eastern Railway Company, the Lancashire and Yorkshire Railway Company, and the Sheffield and South Yorkshire Navigation Company, from altering a swing or opening bridge over the canal into a fixed bridge.

The Canal was originally made by a company incorporated by an Act of 33 Geo. 3, c. cxvii., and after several transfers by different Acts of Parliament was now vested in the defendants the Sheffield and South Yorkshire Navigation Company.

By the Isle of Axholme Light Railway Order, 1898, made by the Light Railway Commissioners, and confirmed by the Board of Trade, under the Light Railways Act, 1896, the Isle of Axholme Light Railway Company was authorized to construct the railways and works described in the Order, including a railway (described as railway No. 3) situated in the parish of Crowle in the county of Lincoln and intended to be carried over the Stainforth and Keadby Canal. Sect. 29 of this Order, which commenced "For the protection of the Sheffield and South Yorkshire Navigation Company," contained amongst others the following sub-sections:—

"(1.) In this section 'the Navigation' means the Stainforth and Keadby Canal and the towing path thereof."

"(3.) The company"—(meaning the Light Railway Company)—"shall carry railway (No. 3) over the Navigation by an opening or swing bridge with a clear opening span throughout between the abutments thereof which shall be parallel to each other and to the centre line of the Navigation of not less than thirty feet measured on the square and no part of the underside of any of the girders of the said bridge shall be of less height than fifteen feet above the ordinary level of the water in the said Navigation :

"(4.) The company shall at all times by night as well as by day make due provision for the opening of the said bridge when required for admitting the passage of barges boats or other vessels through the same without demanding any toll or other payment in respect thereof and no such barge boat or other vessel shall be unduly detained by any delay in opening the said bridge and if the company or any person acting under them shall wilfully

or negligently detain any such barge boat or any other vessel contrary to the provisions of this section the company shall for every such offence be liable to a penalty not exceeding five pounds without prejudice to the rights of any person to recover damages from the company for any loss he may sustain by reason of such detention :

“(5.) The company shall also at their expense keep and maintain the entire width of the waterway under the said bridge between the towing path and the northern abutment of the said bridge of an uniform depth of not less than eight feet below the ordinary level of the water in the Navigation.”

“(8.) The company during the construction and during any repairs of the bridge or any other works crossing or affecting the Navigation shall leave the navigable waterway and towing path free and uninterrupted except so far as may be reasonably agreed between the Navigation Company and the company or as failing agreement may be settled by arbitration as hereinafter provided and if the towing path be obstructed during and owing to any works of construction or repair of the said bridge the company shall so long as such obstruction continues at their own expense provide and work to the reasonable satisfaction of the engineer of the Navigation Company proper and sufficient means of hauling such vessels past the site of the bridge and retaining walls by night and day The company shall during the construction and thereafter exhibit every night from sunset to sunrise a light or lights which shall be kept burning by and at the expense of the company for the guidance of such vessels Such light or lights shall be of such description and be so used and placed as the Navigation Company in writing shall reasonably require The company shall also at the like expense provide fix maintain and work proper signals on the banks of the said Navigation at proper distances from and on each side of the said bridge to inform or warn persons using the said Navigation during foggy weather when the bridge is closed over the Navigation.”

“(16.) The company and the Navigation Company may agree for any variation or alteration of the works in this section provided for or of the manner in which the same shall be executed.”

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The provisions of certain other sub-sections, which it is thought unnecessary to set out in full, are summarized in the judgment of Phillimore L.J.

By the North Eastern Railway Act, 1902 (2 Edw. 7, c. clxviii.), s. 52, the undertaking of the Isle of Axholme Light Railway Company was transferred to and vested in the defendants the North Eastern Railway Company and the Lancashire and Yorkshire Railway Company as part of their joint undertaking under that Act.

The railway No. 3 authorized by the said Light Railway Order was duly constructed under that Order and carried over the Stainforth and Keadby Canal by means of an opening or swing bridge constructed in accordance with the provisions of s. 29 of the Order.

In 1913 the joint railway companies and the Navigation Company, purporting to act under s. 29, sub-s. 16, of the Order, agreed, in consideration of a sum of money to be paid by the railway companies to the Navigation Company, that the swing bridge should be altered into a fixed bridge.

In the month of April, 1913, the Navigation Company issued a public notice that after June 1, 1913, the swing bridge over the canal at Crowle would be made a fixed bridge, and that a crane would be provided at Keadby to lift the masts out of keels free of cost to boatmen. The notice roused very considerable opposition, and the defendants deferred carrying out the alteration until the question was decided by the Court. The writ in this action was issued on June 11, 1913.

It appeared that the canal and its connections were largely used for the carriage of heavy goods such as grain, timber, and flour between the ports of Hull and Grimsby on the Humber and the large towns such as Thorne, Doncaster, Mexborough, Rotherham, and Sheffield in the district served by the canal and its connections, and to carry coals from the numerous collieries in that district. The boats usually sailed both ways on the Humber and the lowest part of the Trent to Keadby and up the first ten miles of the canal to Thorne, where there was the first fixed bridge.

The boats used on the canal were chiefly keels and sloops.

Keel is the local name of boats fitted with a single mast and carrying a large square sail, square topsail, and a jib; their masts could be lowered to pass under a bridge, but only by casting all the rigging adrift. Sloops have fixed masts and could not proceed beyond Thorne without having their masts taken out altogether by a crane.

There were a good many fixed bridges over the canal beyond Thorne, chiefly in the neighbourhood of Doncaster.

The bridge in question was somewhere about halfway between Keadby and Thorne.

There was a considerable conflict of evidence as to the effect of the proposed fixed bridge in loss of time and increase of freight.

Astbury J. decided in favour of the defendants.

The plaintiff appealed.

Romer, K.C., and *Tyldesley Jones*, for the appellant. This question depends upon the construction of the Isle of Axholme Light Railway Commissioners' Order of 1898. The appellant contends that the respondents have no power to convert this swing bridge into a fixed bridge under s. 29, sub-s. 16, of the Order or in any other way. Rights in the navigation were given to the public by the Act of Parliament under which the canal was originally constructed, 33 Geo. 3, c. cxvii., and the Order confirms those rights and gives others, especially in connection with this bridge. The proposed alteration is directly opposed to the provisions of sub-s. 4 and is illegal. The operation of sub-s. 16 ceased as soon as the works were completed and the railway was opened; but however that may be, the sub-section did not give the respondents power to override the direct enactments of the Order. If this bridge is fixed, navigation by vessels with fixed masts will be completely stopped. The provisions of the Order are not made subject to the right to vary, as they would have been if that had been intended: *Countess of Rothes v. Kirkcaldy and Dysart Waterworks Commissioners*. (1) The usual form for giving the parties to a statutory contract power to alter is to insert the words "unless otherwise agreed between them."

(1) (1882) 7 App. Cas. 694.

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The Attorney-General is the proper person to see that the rights of the public are protected and to bring this action on their behalf—*Davis & Sons v. Taff Vale Ry. Co.* (1); *Joseph Crossfield & Sons v. Manchester Ship Canal Co.* (2); *Corbett v. South Eastern and Chatham Ry. Cos.' Managing Committee* (3); *Attorney-General v. Pontypridd Waterworks Co.* (4)—and the Court will grant the injunction: *Attorney-General v. London and North Western Ry. Co.* (5) What is proposed to be done is ultra vires the railway companies.

Uppjohn, K.C., and *Austen-Cartmell*, for the railway companies. We do not say that the public have no rights in the navigation. The canal company comes under the general Acts of Parliament on this subject and the jurisdiction of the Railway and Canal Commissioners. Any member of the public who is obstructed in the use of the canal can apply to the Commissioners. The company is a statutory undertaking and tries to work at a profit. It makes its profit out of the public by the receipt of tolls, and anything which enables it to offer greater advantages to the public is for its own advantage. Anything which is inconvenient to the public is an injury to the company. These considerations must be borne in mind in construing the Order. When the company appeared before the Board of Trade on the settlement of the Order they did so in their own interests, not as representing the public. Sect. 29, sub-s. 16, is not limited to the completion of the works. Works are carried out from time to time. If the appellant is right we should not be able to take advantage of engineering improvements.

The words at the commencement of s. 29, "For the protection of the Sheffield and Yorkshire Navigation Company," show that the provisions of the section merely give rise to a contractual relation between the companies, and where that is the case the observations of Lord Watson in *Davis & Sons v. Taff Vale Ry. Co.* (6), and of Lord Macnaghten in the same case (6), show

(1) [1894] 1 Q. B. 43; [1895] A. C. 542, 552.

(3) [1905] 2 Ch. 280; [1906] 2 Ch. 12.

(2) [1904] 2 Ch. 123; [1905] A. C. 421.

(4) [1908] 1 Ch. 388.

(5) [1900] 1 Q. B. 78.

(6) [1895] A. C. 542, 552, 560.

that the provisions will be construed in the same way as an ordinary contract and may be waived by the parties. It was held there that some of the provisions were for the benefit of the public, and so members of the public could enforce the agreement. But in this case we have only a bargain between the companies, nothing beyond their interests or which can be regarded as an obligation imposed for the benefit of the public. The sub-sections of s. 29 are all bound together by the words "For the protection of the Navigation Company," and those words and the provision at the end of the section that the Canal Company may consent to an alteration of the works show that the whole is a mere bargain between the two companies.

In *Joseph Crosfield & Sons v. Manchester Ship Canal Co.* (1) it was assumed that the parties for whose protection a clause was inserted in a private Act could bring an action to enforce the clause, but in that special case the jurisdiction of the Court was ousted by the clause which bound the parties to go to arbitration.

Two cases have been cited against us. In *Corbett v. South Eastern and Chatham Ry. Cos.' Managing Committee* (2) there was, at the time of the contract sued upon, a binding obligation imposed by statute to maintain a particular station for the benefit of A. unless otherwise agreed with A. The company without coming to any agreement with A. entered into an agreement with B. to remove the station. It was held by the Court of Appeal that the second agreement was ultra vires. But the action was brought by B., there was no question about the general public.

In *Attorney-General v. Pontypridd Waterworks Co.* (3) Warrington J. decided that the Rhondda Urban District Council could not bring an action to enforce a section in a Railway Act which was enacted for their own protection without joining the Attorney-General, but it is doubtful whether that decision can be supported after the decision in *Davis & Sons v. Taff Vale Ry. Co.* (4), and in any case Warrington J.'s statement of the facts shows that the case does not apply here.

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(1) [1904] 2 Ch. 123.

(3) [1908] 1 Ch. 388, 400.

(2) [1905] 2 Ch. 280 ; [1906] 2 Ch. 12.

(4) [1895] A. C. 542.

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[LORD COZENS-HARDY M.R. You must prove that the agreement is not ultra vires the railway companies. Can they pay the money to the Navigation Company? *Tomkinson v. South Eastern Ry. Co.* (1)]

Hon. Frank Russell, K.C., and C. F. Lowenthal, for the Navigation Company. None of the Acts constituting the navigation give the barge owners the right to a swing bridge.

Cur. adv. vult.

March 5. LORD COZENS-HARDY M.R. In this action the Attorney-General, on the relation of a gentleman who is the owner or charterer of a number of keels and sailing vessels using a canal, seeks an injunction to restrain the Navigation Company and two railway companies from converting a swing bridge over the canal into a fixed bridge. The plaintiff asserts that it is contrary to the express provisions of an Order of the Light Railway Commissioners, modified and confirmed by the Board of Trade, that such conversion should be effected. The defendants say that s. 29 of the Order which contains the prohibition also contains express power for the defendants by agreement to vary the terms of the section, and they further contend that the section confers no rights upon the public in respect of which the Attorney-General can sue, and that s. 29 is a mere statutory bargain between two parties who are competent to annul or vary these provisions.

The canal in question was made under the powers of an Act in 1793. It authorized the undertakers to make a canal from Keadby to Stainforth. It was duly made and formed a portion of the water communication between Hull and Doncaster. It is not necessary to consider in detail the provisions of that Act inasmuch as it is admitted that the public had rights of passing and repassing with boats, barges, and other vessels capable of passing through the locks (s. 53). From Keadby for a considerable distance along the canal there was, until recently, no bridge, and vessels with masts could and did sail along this reach until they arrived in the neighbourhood of Doncaster,

where there were a considerable number of fixed bridges. The rights of the undertakers are now vested in the Sheffield and South Yorkshire Navigation Company.

In 1898 it was contemplated that a light railway should be sanctioned which would cross the canal at Crowle. Application was made to the Light Railway Commissioners and also to the Board of Trade. The Navigation Company opposed. In the result an Order was made incorporating a company called the Isle of Axholme Light Railway Company and authorizing the company to make, amongst others, a railway (No. 3) which involved crossing the canal. Sect. 29 is headed: "For the protection of the Sheffield and South Yorkshire Navigation Company the following provisions shall have effect." It is not necessary to refer to more than a few of the sub-sections. [His Lordship read sub-ss. 3, 4, 5 and 16.] In my opinion the provisions of s. 29 are not solely for the benefit of the Navigation Company, but are to some extent for the benefit of the public.

Sub-s. 4, which imposes a penalty, plainly is for the benefit of the public, and I think sub-s. 3 is so likewise. Astbury J. came to the conclusion that sub-s. 16 enabled the railway companies, who are the statutory successors of the Isle of Axholme Light Railway Company, and the Navigation Company, to release the obligations contained in sub-s. 4. I think that sub-s. 16 has no bearing upon the question which is raised in this action. It cannot be that the two parties can deprive the public of the rights conferred by the section. It may be that it applies only to "works," that is to say, authorized physical works, during the course of construction, but I do not base my judgment on this view. It certainly does not apply to workings as distinct from works; that is to say it does not enable them to order that the swing bridge shall not be opened. It was agreed by counsel that all the defendants propose to do is so to attach or fix the arms or movable parts of the swing bridge that it cannot be opened and shut. That would be effected by a few bolts. I prefer, however, to base my decision on broader grounds. I think the rights of the public were not intended to be at the mercy of the Navigation Company and the railway companies. If sub-s. 16 does not apply, it remains to consider whether it is

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possible to say that the defendants can treat s. 29 as a mere contract, which the parties to the contract can release or vary. When once the conclusion is reached that sub-s. 4 is for the benefit of the public it seems to me impossible to arrive at such a decision. Stress was laid on the introductory words "For the protection of the Navigation Company." That is a somewhat modern form. Originally it was in the marginal note. After a time those words were also found in the body of the clause. If it had been intended to put the whole clause at the mercy of the defendants, it would naturally have run, "The following provision shall have effect unless otherwise agreed between the Navigation Company and the railway promoters." Those words may be inserted by parliamentary draftsmen under the idea, which may be correct, that the person for whose protection the clause is inserted may have a direct right of action without proof of damage and without the presence of the Attorney-General. But however that may be, I think the insertion of those words in s. 29 has not the effect contended for by the respondents. *Davis & Sons v. Taff Vale Ry. Co.* (1) seems to me to be a clear authority on this point.

The railway companies have agreed to pay 3750*l.* to the Navigation Company and the Navigation Company have executed a deed, which has not yet been exchanged, by which they purport to release the railway companies from all obligations to maintain the swing bridge as an open or swing bridge, as well as from (a) the obligations and penalties imposed by sub-s. 4 and (b) the obligations to exhibit lights and to provide, fix, and maintain signals imposed by sub-s. 8. This, in my opinion, is ultra vires both companies. *Corbett v. South Eastern and Chatham Ry. Cos.' Managing Committee* (2) is an authority for this proposition. A further point may be raised as to whether it is not also ultra vires the railway companies in so far as it provides for payment of 3750*l.* I express no opinion on this point and I only mention it as a matter which if necessary for our decision in some other case may require careful consideration.

I was suggested on the part of the defendants that it would

(1) [1895] A. C. 542.

(2) [1905] 2 Ch. 280; [1906] 2 Ch. 12.

be more beneficial to the public that the swing bridge should be done away with, and that the money should be spent by the Navigation Company in otherwise improving their canal. That may be good ground for an application to Parliament for an amending Act, but it is not relevant to anything we have to deal with when once it is established that the defendants are threatening to do that which is expressly prohibited by the existing Order.

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PHILLIMORE L.J. The question in this case turns upon the construction of s. 29 of the Isle of Axholme Light Railways Order, 1898, made by the Light Railway Commissioners, and modified and confirmed by the Board of Trade.

For the understanding of the position it is necessary to add that the light railway has become a part of the joint undertaking of the defendant railway companies, and that the canal was at the time of the passing of the Light Railway Order, and still is, the property of the defendant Navigation Company.

By s. 29 certain provisions are enacted which are stated to be "For the protection of" the Navigation Company. Sub-s. 2 relates to the entrance by the railway company upon the lands of the Navigation Company. It is to be noted that in both paragraphs (A) and (B) of sub-s. 2 the provisions operate to prohibit the railway company from doing certain things "without the consent of" or "except by agreement with" the Navigation Company. Sub-s. 3 requires the railway to be carried over the canal by an opening or swing bridge with a clear opening span, and of a height above the water, as therein prescribed. Sub-s. 5 requires the railway company to keep a certain width and depth of water under the bridge between the towing path and the northern abutment. Sub-s. 6 provides for the erection of training walls on both sides of the canal for a certain distance east and west of the bridge. Sub-s. 7 provides for the strength of the foundations to the reasonable approval of the engineer of the Navigation Company. Sub-s. 9 has a general provision that all the works are to be reasonably approved by the engineer, or to be determined by arbitration. The first part of sub-s. 8, and sub-ss. 10 to 14, deal with questions arising during construction.

C. A. The important sub-sections remaining to be considered are
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Sub-s. 4 assumes that the bridge is an opening or swing bridge, and requires the railway company at all times by night or day to make due provision for the opening of the bridge when required for the passing of vessels, without demanding toll, and imposes a penalty of 5*l.* if any vessel is unduly detained by delay in opening the bridge, and this without prejudice to the rights of any person to recover damages for the detention. The latter part of sub-s. 8 requires the railway company during construction, and thereafter, to light the bridge from sunset to sunrise for the guidance of vessels, and to provide signals during foggy weather to warn vessels when the bridge is closed. Sub-s. 16 provides that the two companies "may agree for any variation or alteration of the works in this section provided for or of the manner in which the same shall be executed."

The defendant companies have now agreed between themselves that this bridge shall be converted into a fixed bridge, the railway companies having agreed to pay to the Navigation Company a sum of money for its consent. They have published notice of their intention, and taken certain steps towards effecting it. The effect will be that sailing vessels with fixed masts will no longer be able to pass this bridge. Practically they will have to stop and tranship, or have their masts taken out by shears where the canal begins at Keadby. Hence this action.

It is not disputed that the canal is a public undertaking, and that the defendant Navigation Company as its proprietor has a duty to keep up the navigation for the benefit of vessels seeking to use it. We had occasion to consider and assert the duties of a canal company in the recent case of *In re Woking Urban Council (Basingstoke Canal) Act, 1911*. (1)

The defendant companies rely on the provision of sub-s. 16, and say that the bridge is a "work" which they may by agreement vary or alter. It is contended for the Attorney-General that this sub-section only applies during construction and so as to enable original amendments. I think this construction too narrow. But whether the bridge is a work which might be

altered from an opening bridge to a fixed bridge, or whether the opening bridge is the work which can only be altered in detail, or whether what it is proposed to do is an alteration at all are other questions. It is, however, not material to decide them because of sub-s. 4. This sub-section requires the Navigation Company at all times to make due provision for the opening of the bridge. The requirement is unconditional and the Order has the force of a statute. The latter part of sub-s. 8 adds force to this.

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But it is said that the use of the words "For the protection of" shows that the whole section is for enforcing a bargain between the two companies in which the public had no concern, and which either party to the bargain may waive. Very likely its origin was in a bargain, but none the less the Order may confer rights on third parties, and the public, which cannot now be got rid of. The Legislature or the substitute for the Legislature in these matters has to consider, and does consider, the interests of the public. There are third parties to such a bargain, and it may well be that public considerations entered into the framing of the clause. Anyhow, if the clause is there, its origin is unimportant. For this we have the authority of the House of Lords in *Davis & Sons v. Taff Vale Ry. Co.* (1) True in that case the clause may not have been a bargain. It may well be that the promoting company, and the opposing company, could not get near enough, and that the committee had to decide between them. If so it was a decision *inter partes*, and yet it gave rights to the public. No doubt the words "For the protection of" must be borne in mind in construing the section. They are a condensed preamble. One effect they apparently have is to give the protected person or body a right to sue for the enforcement without invoking the Attorney-General. This seems decided by the case of *Joseph Crossfield & Sons v. Manchester Ship Canal Co.* (2) Otherwise the right to sue would be doubtful if the decision of Warrington J. in *Attorney-General v. Pontypridd Waterworks Co.* (3) be correct.

But when it is intended that a protective clause should

(1) [1895] A. C. 542.

(2) [1905] A. C. 421.

(3) [1908] 1 Ch. 388

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be capable of waiver there is a well-known form of drafting according to which the protection is to apply unless otherwise agreed. Sect. 28 of this Order, which is a protective section, accordingly has the qualification "unless with the previous consent of." So sub-s. 2 of s. 29 has the phrases already quoted. In sub-s. 4 there is no such qualification. In its inception it may have been framed and agreed to, or it may have been decided upon a dispute *inter partes* by the Board of Trade (we know not which it was) as a protection to the Navigation Company. But it may well be that one reason for framing it in its present absolute form was care for the interests of those navigating the canal, as well as for the Navigation Company itself. At any rate there it is, and the Attorney-General has a right to call upon the Courts to enforce it.

I have not thought it necessary to deal with the suggestion of *ultra vires*.

I think that the appeal should be allowed, and that the injunction prayed for should be granted.

JOYCE J. I agree. The 29th section of the Light Railway Order expressly provides in the 3rd sub-section as to the mode in which the proposed railway No. 3 is to be carried over the canal. Then in sub-ss. 4 and 5—at all events in 4—come provisions as to the opening of the bridge when required which to my mind are obviously for the public benefit. They are with reference to the traffic, no doubt, but obviously for the public benefit, and for the protection of the public who are entitled to use the canal; and use the canal not merely for the benefit of the Navigation Company considered as a commercial undertaking. Then in sub-s. 9 (I need not refer to all these clauses) there is this: "All works crossing or affecting the navigation shall be executed in accordance with plans sections and specifications to be previously submitted to and reasonably approved in writing by the said engineer or in the event of his disapproving the same to be unless agreed between such engineer and the engineer of the company settled by arbitration." Pausing there for the moment, and not forgetting sub-s. 16, supposing plans had been originally submitted by the railway company for the erection of the bridge as a

fixed bridge, and those plans had been approved, rightly or wrongly, by the engineer of the Navigation Company, and the works had been so carried out and executed. In my opinion that would have been illegal, and a violation of the express terms of this sub-section unless it could be possibly justified under the 16th sub-section. But then, last of all, comes the 16th sub-section. [His Lordship read that sub-section.] How is that to be read? It would be a strange thing, to my mind, if that sub-section enabled the two companies by agreement to abrogate sub-s. 3, and sub-s. 4 and other sections as well, for that is really what it is contended it would enable them to do, and really to make the works crossing the canal in whatever manner they pleased. Is this 16th sub-section equivalent to a proviso overriding everything that has gone before? Is it as if it said "Provided always and notwithstanding anything hereinbefore enacted the two companies may make provision for crossing the canal just as they may agree"? Or is it really to be read as subject to the foregoing provisions, and without prejudice to them, and as not authorizing any alteration or variation except such as would not contravene the provisions of the foregoing express sub-sections? For my part I think the latter is the better and the true construction.

Now I am not prepared to define the precise extent or limits of the alterations, or variations, referred to in sub-s. 16, but at all events having regard to the previous express provisions of s. 29 I should be prepared if necessary to hold that sub-s. 16 does not authorize any alteration or variation that would have the effect of making the railway line cross the canal otherwise than by a bridge, as, for instance, by an ordinary embankment with a line on the top, or that would make the bridge carrying the railway over the canal other than an opening or swing bridge. To substitute an ordinary or fixed bridge for the present swing bridge would, I think, be more than a mere alteration or variation of the works provided for. It would be to change the principal work altogether for something entirely different in the most essential particulars not authorized expressly by the Order, and, in truth, as I think, forbidden by it.

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Further, it is impossible, I think, that the obligations imposed upon the railway company by sub-s. 4 for the benefit of the public can be discharged or released, either directly by any agreement between the railway company and the Navigation Company, or indirectly as the consequence of any alteration or variation they may agree upon under sub-s. 16. Whatever may be done to the present swing bridge, as, for instance, if it be locked up or closed, still I do not see that this would relieve the railway company from the obligation under sub-s. 4 to open the bridge if and when required for the traffic.

LORD COZENS-HARDY M.R. The appeal will be allowed with costs here and below.

Solicitors: *Ince, Colt, Ince & Roscoe, for Andrew M. Jackson & Co., Hull; R. F. Dunnell; Johnson, Weatherall & Sturt, for Broomhead, Wightman & Moore, Sheffield.*

J. R. B.

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*In re* DE VIRTE.  
 VAIANI v. RUGLIONI DE VIRTE.

[1913 D. 1698.]

*Election—Foreign Will—Devise of Real Estate in England—Defective Execution—Invalidity—Devolution—Residuary Legatee Heir.*

Where by a foreign will, not so executed as to pass real estate in England, real estate in England is devised away from the heir and personal estate is bequeathed to the heir, the heir is not bound to elect between the real and personal estates, but takes both.

*Hearle v. Greenbank* (1749) 3 Atk. 695, 715, applied.

A testatrix resident and domiciled in Italy in 1899 made an Italian will purporting to give real estate in England to V. absolutely, and her residuary real and personal estate to R. The will was not so executed as to be effectual to pass real estate in England. R. was the testatrix' heir-at-law. In 1901 the testatrix by deed settled the English real estate upon trust for V. for life with remainder for his

children in tail, and an ultimate remainder to the use of herself in fee. V. died, not having had children:—

*Held*, that R. was entitled to both the English realty as heiress-at-law and the personalty as residuary legatee, and was not put to her election between the two.

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#### ADJOURNED SUMMONS.

By her will dated May 28, 1899, made at Ripafratta in the Commune of the Bagni di San Giuliano, in Italy, in the Italian language, the testatrix, described as domiciled at Ripafratta, gave as follows (according to the translation on which letters of administration were granted): "As a legacy I bequeath to . . . . Alessandre Vaiani my property in England at Dittisham South Devonshire . . . . I institute and nominate my beloved daughter Maria Louisa Ruglioni née de Virte to be residuary legatee of my real and personal estate of whatever nature."

The testatrix appointed an executor resident in Italy.

The will was signed by the testatrix alone, without attesting witnesses.

By a deed of settlement in English form dated June 17, 1901, the testatrix settled the Dittisham estate on Alessandre Vaiani for life, with remainder to his children in tail, and an ultimate remainder, subject to an annuity to his widow, to the use of the testatrix, her heirs and assigns.

On July 31, 1904, the testatrix died. At the time of her death her domicile was Italian.

Her daughter, the Baroness Maria Louisa Ruglioni de Virte (the residuary legatee under the will), was her heiress-at-law.

The will was recognized as valid in Italy.

Some objection being raised or threatened to the will being proved in England, the Baroness agreed that, if Vaiani would make no difficulty as to the probate, she would give up for his benefit a portion of the personal estate. The agreement was carried out.

On December 24, 1904, letters of administration with the will (as contained in a translation) annexed of all the estate which by law devolved to and vested in the personal representative of the deceased were granted at the principal probate registry of the High Court for the use and benefit of the executor and until



JOYCE J. he should apply for and obtain probate of the will to his lawful attorney.

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On March 22, 1913, Alessandro Vaiani died, leaving a widow and without having had issue.

Thereupon the ultimate remainder limited by the settlement to the testatrix, her heirs and assigns, of the Dittisham estate took effect, subject to the widow's annuity.

Upon this summons, taken out by the executors of Alessandro Vaiani, the Baroness (the defendant) claimed, as the heiress-at-law of the testatrix, to be entitled, subject to the annuity, to the Dittisham estate, the will admittedly not being effectual to pass real estate in England although it was effectual as to personalty under Lord Kingsdown's Act (24 & 25 Vict. c. 114).

*Tomlin, K.C.*, and *F. McMullan*, for the executors of Alessandro Vaiani. Vaiani giving up his objection to the Italian will being proved in England was entitled to have the invalid disposition of the Dittisham estate given effect to.

If the defendant is not bound *ex contractu* to take according to the tenor of the Italian will, she must be put to her election whether she will take under it or against it—she cannot take both the residuary estate under the will and the Dittisham estate as heiress-at-law. For the determination of questions of this kind the Italian law refers to the law of the testatrix' nationality, which in this case must be either Scotch or English law. The testatrix became naturalized as a British subject during her coverture. It does not matter whether English or Scotch law applies, as the application of either would have the effect of putting the defendant to her election. She cannot take advantage of the gift of personalty under the will without giving effect to the invalid disposition of the real estate: *Dicey's Conflict of Laws*, 2nd ed. pp. 830—836; *Brodie v. Barry* (1); *Harrison v. Harrison* (2); *Dundas v. Dundas* (3); *Dewar v. Maitland* (4); *In re Johnson* (5); *Westlake's Private International Law*, 5th ed. s. 125, p. 161.

*Hughes, K.C.*, and *J. I. Stirling*, for the defendant. First, there

(1) (1813) 2 V. & B. 127.

(3) (1830) 2 Dow & Cl. 349.

(2) (1873) L. R. 8 Ch. 342.

(4) (1866) L. R. 2 Eq. 834.

(5) [1903] 1 Ch. 821.

was no agreement by the defendant to give up the Dittisham estate. Secondly, this is not a case for election. The law of the testatrix' nationality was English. She had lost her Scotch domicile on marrying a Frenchman. Consequently the English law is applicable. The issue is as to immovable English property, and the question is one purely of English law. According to that law no doctrine of election can be invoked, as, the will being inoperative to pass real estate, there is properly no will at all of the real estate. The will cannot be looked at so as to impose an obligation on the heir to elect: *Hearle v. Greenbank* (1); *Sheddon v. Goodrich* (2); *Cary v. Askew* (3); *In re Anderson* (4); *Dewar v. Maitland*. (5) The rule of law is not the same in regard to real estate in Scotland: *Brodie v. Barry* (6); *Dundas v. Dundas*. (7) Under Scotch law the will can be looked at to find an express or implied intention or condition with which the heir must comply if he wishes to take under the valid disposition. There is no such intention here. So far as there is any intention it is in the defendant's favour. If the matter rested on implied condition, it might be more difficult.

*Tomlin, K.C.*, in reply. The question of election here arises in regard to the disposition of properties situate in different countries, and the cases cited against election accordingly do not apply. The question is one of private international law: Dicey's Conflict of Laws, 2nd ed. pp. 830 et seq., note 22; *Brodie v. Barry*. (6) That law, whether rightly so called or not, is a branch of English law. The doctrine of election rests on principles of equity acting on the conscience. Effect must be given to the intended disposition of the realty if the legatee desires to take the personalty, and the defendant can only successfully assert her right to the personalty by giving effect to that disposition: *Dundas v. Dundas*. (7)

\*

*Cur. adv. vult.*

Jan. 27. JOYCE J. The testatrix by origin was Scotch, her maiden name being Margaret McLeod. She was born in

(1) 3 Atk. 695, 715.

(2) (1803) 8 Ves. 481, 496.

(3) (1786) 1 Cox, 241, 244; 2

Bro. C. C. 58.

(4) [1905] 2 Ch. 70, 75, 76.

(5) L. R. 2 Eq. 834, 839.

(6) 2 V. &amp; B. 127.

(7) 2 Dow &amp; Cl. 349, 376.

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Edinburgh in the year 1814, and married in the year 1850, or thereabouts, Baron de Virte, I think a native of Alsace, then French, and an officer in the French army. They left France and went to reside in Italy, where the Baron died in the year 1893.

The testatrix remained or continued to reside in Italy until her death on July 21, 1904. In 1881 she purchased the Dittisham estate in Devonshire, and she made some additions thereto in the year 1886. Her will was made in Italy in the month of May, 1899, and, although valid and effectual as to personal estate or movables, was not so executed as to pass real estate or immovables in England. Such will, however, purports to dispose of the testatrix's real estate in England in these terms: "As a legacy I bequeath to"—a gentleman named Alessandre Vaiani—"my property in England at Dittisham South Devonshire"; and she also devised to him a sum of money. She also by the same will instituted and nominated "my beloved daughter Maria Louisa Ruglioni née de Virte to be residuary legatee of my real and personal estate of whatever nature." Then she nominates an executor. This lady, Louisa, is the Baroness Ruglioni, the first defendant, and is the only child and heiress-at-law of the testatrix.

Two years after this will, namely, on June 17, 1901, the testatrix made a formal settlement by deed of the Dittisham property upon Vaiani, the devisee or legatee under the will. Thereby the estate was settled upon trusts, speaking broadly, for the benefit of Vaiani for life and his children—he never had any—after him in tail, the ultimate remainder (subject, however, to an annuity to Vaiani's widow) being to the use, not of Vaiani, who is nominally the legatee of the property under the will, but of the testatrix herself, her heirs and assigns. To this extent therefore the testatrix appears to have changed her mind, and, if the will had been executed so as to affect real estate in England, this settlement—but for the provisions of s. 23 of the Wills Act, if in the circumstances it applied—would have been a revocation of the disposition, if otherwise valid, of the Dittisham estate contained in the will.

Then on July 21, 1904, the testatrix died, and it is admitted on all hands, if it be material, that at the time of her

death her domicile was Italian. Some objection was raised or threatened by Vaiani or his advisers in reference to the will under which the Baroness was residuary legatee being proved in England. I do not understand that there was any ground whatever for objecting to the probate, but the Baroness to prevent any trouble proposed and agreed—which she did, as it appears to me, more out of generosity than anything else, and she was quite well disposed towards Vaiani, and he to her—that, if Vaiani would make no difficulty as to the probate, she would give up for his benefit a portion of the personal estate. There was no agreement or discussion, or, at all events, no express agreement, with respect to the ultimate devolution of the Dittisham estate in the event then possible, but not so far as I can judge considered probable, of Vaiani dying without issue. The will was proved on December 24, 1904. Then, later, on March 22, 1913, Vaiani did die without having had issue, whereupon (subject to his widow's annuity) the ultimate remainder in the settlement took effect or fell into possession, and the Baroness Ruglioni, the only child and heiress-at-law of the testatrix, claims the property accordingly.

But the representatives of Vaiani, I think the plaintiffs in the summons, now contend that, although throughout the negotiations in 1904 nothing was stipulated about the Dittisham estate, the effect of Vaiani forgoing or withdrawing any objection he might have raised to the probate of the will was to entitle him or his representatives to insist upon the invalid disposition which the will contained of the Dittisham estate being given effect to by Baroness Ruglioni, who otherwise succeeds as heiress-at-law. Upon the evidence most certainly no express contract on the part of the Baroness to give up any interest in the Dittisham estate or effectuate the invalid disposition thereof by the unattested will can be made out; all she agreed to do was to give up part of the personalty, and this she did.

I hold the Baroness to be under no obligation by virtue of any actual or implied contract to give up the Dittisham estate to the representatives of Vaiani.

But, secondly, or alternatively, it was urged that, quite apart from any such contract or agreement as alleged or contended

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for, the Baroness, the heiress-at-law of the testatrix, before or upon her taking her mother's personalty under the will became in the circumstances bound to elect between such personalty and the Dittisham estate. Various cases were cited to me where something of this kind was decreed in the case of the heir to Scotch or foreign real estate—what Mr. Theobald, perhaps not very accurately, calls the case of a foreign heir, where he says, citing the usual cases, “These rules do not, however, apply to a foreign heir.” (1) That means in the case of heirship to foreign immovables. There has been no such decision, indeed the contrary is in my opinion established, with respect to the heir-at-law of English land. I think that the present case is governed by the class of cases of which *Hearle v. Greenbank* (2) is the leading instance. The authority of these decisions is not disputed, but it was argued that they did not apply. Well, I think that they do apply, and I follow them without hesitation, the result being, in my opinion, that the Baroness is not under an obligation to elect between the personalty and this real estate in England.

Solicitors: *Mann & Crimp, for Hacker & Michelmores, Newton Abbot; Wilkinson, Raikes & Son.*

(1) Theobald's Law of Wills, 7th ed. p. 111.

(2) 3 Atk. 695, 715.

A. L.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1915, will be as follows :—

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[1915] 1 Ch. [1915] 2 Ch.

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Annuities in Names of Trustees.*

By a will certain pecuniary legacies were  
given to relations, and two annuities were given  
to two ex-servants of the testatrix, who directed  
that her trustees should provide for the annuities  
by setting aside and appropriating a portion of  
her estate sufficient to answer them by the  
income thereof; that until such appropriation  
the annuities should be paid out of the residuary  
estate; and that upon cesser of an annuity a  
proportion of the capital so set aside and appro-  
priated should sink into and form part of her  
residuary estate. She also declared that neither

**ADMINISTRATION**—*continued.*

annuitant should be allowed to have the value  
of the annuity in lieu thereof, and that if the  
annuitant should do or suffer any act or thing  
whereby the annuity should be assigned, charged,  
or incumbered, the annuity should thenceforth  
cease to be payable. She gave her residuary  
estate in trust for other persons. The estate  
was sufficient to pay all the pecuniary legacies  
in full and to provide sums enough to purchase  
annuities of the amounts given by the will, but  
was not sufficient to pay the legacies in full and  
to provide two funds sufficient by their income  
to pay the annuities in full :—

*Held*, (1.) that the declaration as to cesser of  
the annuity on assignment, charge, or incum-  
brance was not repugnant to the previous gift of  
the annuities, but that there was a good gift  
over, on such an event happening, to the  
residuary legatees; (2.) that sums sufficient to  
buy annuities of the amount mentioned in the  
will must be set aside, but (3.) that the annuitants,  
having regard to the fact that their annuities  
were determinable, were not entitled to payment  
of the sums set aside, but that those sums must  
be invested by the trustees in the purchase of  
annuities to be paid to the annuitants for their  
lives or until they should assign, charge, or  
incumber them.

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than One Year from Testator's Death—Rate of  
Interest—Interest on Estate Duty—Adjustment  
of Accounts.*

Testator gave his real and personal estate not  
thereby otherwise disposed of, therein called his  
residuary estate, to his trustees in trust to sell,  
and out of the proceeds pay or provide for debts,

**ADMINISTRATION—continued.**

funeral and testamentary expenses, legacies and annuities, and duties, and to divide the residue into nine equal shares, and to invest and pay the income of one ninth share to each of his three daughters during her life with remainders over, and (by clause 15) the testator empowered his trustees to postpone the sale and conversion of all or any part of his real and personal estate as long as they should think proper, and directed that the income from his estate however invested should after his death be treated as income, and no part thereof should be added to capital. Testator died in 1909, leaving an estate of great value. The payments required to be made out of his residuary estate in respect of debts, legacies, duties, &c., were not concluded till the expiration of five years from the date of the testator's death. The average rate of interest earned by the estate in each of these five years varied considerably. On an originating summons raising the question how the accounts ought to be adjusted between the tenants for life and the remaindermen of the daughters' settled shares of residue :—

*Held*, that the direction contained in clause 15 of the will did not displace the rule in *Allhusen v. Whittell* (1867) L. R. 4 Eq. 295 and *In re McEuen* [1913] 2 Ch. 704.

*Held*, also, that the true principle was to deprive the tenant for life of the income of such a sum as together with interest thereon from the date of the testator's death down to the date of payment was sufficient to satisfy the liabilities.

*Held*, also, that the principle was not limited to the payments made during the first year from the testator's death, but applied equally to payments made during the subsequent years.

*Held*, also, that the average rate of interest earned by the estate in each year ought to be adopted for the purpose of this calculation.

*Held*, also, that as regards estate duty the total amount paid for duty and interest thereon ought to be treated as the debt or liability to be paid or discharged. *In re WILLS. WILLS v. HAMILTON* - - - **Sargent J. 769**

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An alien enemy's wife resident in the United Kingdom and duly registered under the Aliens Restriction Act, 1914, and Aliens Restriction Order, 1914, can maintain an action in the Courts of this country for the purpose of asserting her individual rights.

Statement of the law in Hall's International Law, 6th ed. p. 388, approved. *PRINCESS THURN AND TAXIS v. MOFFITT* - **Sargent J. 58**

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- Underlease, Agreement for—Covenant not to assign without consent of lessor—Breach—Covenant running with land—Assigns - - - 549  
*See LESSOR AND LESSEE.*

**ASSIGNMENT**—Expectant share as one of next of kin of living person—Assignment of by way of mortgage—Bankruptcy and discharge of mortgagor before falling into possession of share—Effect on mortgage - - - 744  
*See MORTGAGE.*

- Settled land—Life estate—Assignment for value—Settlement by assignee's will—Death of assignee—Sale by original life tenant—Persons qualified to consent  
*See SETTLED LAND. 1. 443*

**ASSURANCE.***See INSURANCE.***ASSURANCE COMPANIES ACT, 1909, s. 1 (a); s. 2, sub-s. 1; s. 30 (a) - - - 721**  
*See INSURANCE.***ATTORNEY-GENERAL**—Light railway company—Right of Attorney-General to enforce contract on part of the public  
*See RAILWAY. 905***AUSTRALIA**—Will—Charitable legacy—Debentures of Australian land company—"Interest in land" in England of no value - - - 626  
*See WILL. 6.***BAILEE**—Chattels lost or injured—Claim for compensation by remainderman—Trustee or bailee—Liability of estate of tenant for life - - - 829  
*See WILL. 8.***BANK** — *General Account — Mixing of Trust Funds with Private Moneys—Charge on Balance for Trust Funds.*

Payments into a general account cannot, without proof of express intention, be appropriated to the replacement of trust money which has been improperly mixed with that account and drawn out.

A company sold its business to W., who, by the agreement for sale, was to get in the book debts of the business then owing, and, on or before April 30, 1913, to pay over to the company all moneys received by him on account of the book debts, "such amount to be equal to the gross amount of the debts owing on March 1, 1913. Thereafter all debts then outstanding" were to "belong to the purchaser." The gross amount of the book debts so owing was 623*l.* 8*s.* 5*d.*, and W. collected this sum and before or on May 19, 1913, paid 455*l.* 18*s.* 11*d.*, part thereof, into his private general account at a bank. By May 21, 1913, he had drawn out all the money standing to his credit, except 25*l.* 18*s.*, and applied it for his own purposes and not in paying the company as agreed. Subsequently he paid in moneys of his own, and drew on the account for his own purposes, with the result that on his death there was a credit balance of 358*l.* 5*s.* 5*d.* In an action by the company against the trustee of W.'s property under an administration order in bankruptcy the company claimed to have a charge on the 358*l.* 5*s.* 5*d.* for the 455*l.* 18*s.* 11*d.* :—

*Held, (1.) that W. was a trustee for the*



**BANK**—continued.

company of the 455*l.* 18*s.* 11*d.*; but (2.) that the company's charge extended only to the intermediate balance of 25*l.* 18*s.*

*In re Hallett's Estate* (1880) 13 Ch. D. 696 distinguished. JAMES ROSCOE (BOLTON), LIMITED *v.* WINDER — — Sargant J. 62

— Bonds to bearer—Box at bank—Delivery of key to donee—Validity — — 195  
*See* DONATIO MORTIS CAUSA.

— Trading with the enemy—Practice—Cheque drawn by German bank on English bank—Cheque dishonoured—Parties to summons—Costs — 848  
*See* TRADING WITH THE ENEMY.

**BONDS TO BEARER**—Donatio mortis causa—Box at bank—Delivery of key to donee—Validity — — — 195  
*See* DONATIO MORTIS CAUSA.

**BUILDING**—Provision against interference with main structure of building—Injunction—Lands Clauses Acts—Compulsory purchase—Special Act—"Take or interfere with"—Destruction of access to church — — — — 1  
*See* LANDS CLAUSES ACTS.

**BUILDING SOCIETY**—Winding-up—Official Receiver—Creditors—Dividends overpaid—Payment by Mistake of Law—Refunding Amount overpaid.

In the winding up of a building society the Court of Appeal affirmed the decision of Neville J. that the A and B shareholders of the society were entitled to be paid in full out of the assets of the society in priority to a third class of creditors called depositors. The assets being amply sufficient for that purpose, the liquidator, who was the official receiver, thereupon paid the claims of the B shareholders in full before he received notice of an appeal by the depositors to the House of Lords. That House varied the judgment of the Court of Appeal by directing that the depositors were entitled to share rateably with the A and B shareholders in the assets, and this decision gave an all-round dividend of 16*s.* in the pound.

On the application of the liquidator the B shareholders were ordered to refund 4*s.* in the pound, being the amount they had received in excess of 16*s.* in the pound.

*In re BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY* — — — Neville J. 91

**CANADA**—Shares in Canadian land company—Will—Tenant for life and remainderman—Wasting securities—Income in specie — — — — 187  
*See* WILL. 19.

**CAPITAL MONEYS**—Increment value duty—Reversion duty—Payable out of capital moneys—Charge—Expenditure—"Reasonably incurred"—Accounts—Returns—Valuations—Revenue—Settled estate — — — — 29  
*See* REVENUE. 2.

**CAR**—Motor car.

*See* under MOTOR CAR.

**CASES** :—

— *Abergavenny Improvement Commissioners v. Straker* (1889) 42 Ch. D. 83.  
Followed. *HAILSHAM CATTLE MARKET COMPANY v. TOLMAN*

[1915] 1 Ch. 360

— *Abrahams, In re* — — [1908] 2 Ch. 69  
Discussed. *In re SMELTING CORPORATION. SEAVER v. THE COMPANY*

[1915] 1 Ch. 472

— *Adam Eyton, Ltd., In re* (1887) 36 Ch. D. 299.

Applied. *In re RUBBER AND PRODUCE INVESTMENT TRUST* [1915] 1 Ch. 382

— *Ailesbury (Marquis of) and Lord Iveagh, In re* [1893] 2 Ch. 345.

Applied. *In re TRAFFORD'S SETTLED ESTATES* — — [1915] 1 Ch. 9

— *Akerman, In re* — — [1891] 3 Ch. 212  
Discussed. *In re SMELTING CORPORATION. SEAVER v. THE COMPANY*

[1915] 1 Ch. 472

— *Alfred Melson & Co., In re* [1906] 1 Ch. 841, 844.

Applied. *In re CLANDOWN COLLIERY COMPANY* — — [1915] 1 Ch. 369

— *Allhusen v. Whittell* (1867) L. R. 4 Eq. 295  
Referred to. *In re WILLS. WILLS v. HAMILTON* — — [1915] 1 Ch. 769

— *Arden v. Arden* — (1885) 29 Ch. D. 702  
Principle of, applied. *GRESHAM LIFE ASSURANCE SOCIETY v. CROWTHER*

[1915] 1 Ch. 214

— *Arnold v. Arnold* (1835) 2 My. & K. 365, 374.

Followed. *In re RICHARDSON. RICHARDSON v. RICHARDSON*

[1915] 1 Ch. 353

— *Ashburton (Lord) v. Nocton* [1914] 2 Ch. 211.

Reversed — — [1915] 1 Ch. 274

— *Attorney-General v. Clack* (1839) 1 Beav. 467.

Distinguished. *In re COTTER. JENNINGS v. NYE* — — [1915] 1 Ch. 307

— *Attorney-General v. Long Eaton Urban District Council* [1914] 2 Ch. 251.

Affirmed — — [1915] 1 Ch. 124

— *Averill, In re* — — [1898] 1 Ch. 523  
Distinguished. *In re STEVENS. STEVENS v. STEVENS* [1915] 1 Ch. 429

— *Aynsley, In re; Kyrle v. Turner* [1914] 2 Ch. 422.

Affirmed on different grounds [1915] 1 Ch. 172

— *Baker v. Yorkshire Fire and Life Assurance Co.* [1892] 1 Q. B. 144.

Applied. *HICKMAN v. KENT OR ROMNEY MARSH SHEEP-BREEDERS' ASSOCIATION* — [1915] 1 Ch. 881

## CASES—continued.

- *Birkbeck Permanent Benefit Building Society, In re* [1912] 2 Ch. 183.  
See *In re BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY*  
[1915] 1 Ch. 91
- *Birmingham Corporation v. Foster* (1894) 70 L. T. 371.  
Explained. *HAILSHAM CATTLE MARKET COMPANY v. TOLMAN*  
[1915] 1 Ch. 360
- *Bisgood v. Henderson's Transvaal Estates* [1908] 1 Ch. 743, 759.  
Observations in, followed and applied. *HICKMAN v. KENT OR ROMNEY MARSH SHEEP-BREEDERS' ASSOCIATION*  
[1915] 1 Ch. 881
- *Bradford Banking Co. v. Briggs* (1886) 12 App. Cas. 29, 33.  
Observations in, followed and applied. *HICKMAN v. KENT OR ROMNEY MARSH SHEEP-BREEDERS' ASSOCIATION*  
[1915] 1 Ch. 881
- *Bridger, In re* - - [1894] 1 Ch. 297  
Followed and applied. *In re GROSS. GROSS v. GROSS* - [1915] 1 Ch. 572
- *Browne v. La Trinidad* (1887) 37 Ch. D. 1  
Referred to. *HICKMAN v. KENT OR ROMNEY MARSH SHEEP-BREEDERS' ASSOCIATION* - [1915] 1 Ch. 881
- *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.* [1906] A. C. 305.  
Discussed. *BEARD v. MOIRA COLLIERY COMPANY, LIMITED* [1915] 1 Ch. 257
- *Carr v. Ingleby* (1831) 1 De G. & Sm. 362, n.  
The principles of, followed. *In re DEMPSTER. BORTHWICK v. LOVELL*  
[1915] 1 Ch. 795
- *Challenger v. Sheppard* (1800) 8 T. R. 597  
Distinguished. *In re JONES. LAST v. DOBSON* - [1915] 1 Ch. 246
- *Chant, In re* - - [1900] 2 Ch. 345  
Followed. *In re JONES. LAST v. DOBSON* - [1915] 1 Ch. 246
- *Chayton, In re* - - [1905] 1 Ch. 233  
Distinguished. *In re INMAN. INMAN v. INMAN* - [1915] 1 Ch. 187
- *Cherry v. Boulton* (1839) 4 My. & Cr. 442  
Referred to. *In re SMELTING CORPORATION. SEAVER v. THE COMPANY*  
[1915] 1 Ch. 472
- *Cobbold, In re* - - [1903] 2 Ch. 299  
Attention called to errata in the report of. *In re DAVEY. PRISK v. MITCHELL*  
[1915] 1 Ch. 837, 847, n.
- *Collyer v. Isaacs* - (1881) 19 Ch. D. 342  
Distinguished. *In re LIND. INDUSTRIALS FINANCE SYNDICATE, LIMITED v. LIND* - [1915] 1 Ch. 744
- *Cooper v. Cooper* (1874) L. R. 7 H. L. 53, 69  
Applied. *In re WILLIAMS. CUNLIFFE v. WILLIAMS* - [1915] 1 Ch. 450

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- *Cosier, In re* - - [1897] 1 Ch. 325  
Followed. *In re TROLLOPE. GAME v. TROLLOPE* - [1915] 1 Ch. 853
- *Cottrell, In re* - - [1910] 1 Ch. 402  
The principles of, followed. *In re DEMPSTER. BORTHWICK v. LOVELL*  
[1915] 1 Ch. 795
- Rule in, followed. *In re RICHARDSON. RICHARDSON v. RICHARDSON*  
[1915] 1 Ch. 353
- *Crips, In re* - - (1906) 95 L. T. 865  
Followed. *In re JOHNSON. COWLEY v. PUBLIC TRUSTEE* [1915] 1 Ch. 435
- *Currie's Settlement, In re* [1910] 1 Ch. 329  
Compare *In re CONNELL'S SETTLEMENT. In re BENETT'S TRUSTS. FAIR v. CONNELL* - [1915] 1 Ch. 867, 881, n.
- *Dawson, In re, Pattison v. Bathurst* [1915] 1 Ch. 168.  
Affirmed - - [1915] 1 Ch. 626
- *Devdney, In re* - (1809) 15 Ves. 479, 498  
Applied. *In re FLEETWOOD AND DISTRICT ELECTRIC LIGHT AND POWER SYNDICATE* [1915] 1 Ch. 486
- *Didisheim v. London and Westminster Bank* [1900] 2 Ch. 15.  
Referred to. *PÉLÉGRIN v. COUTTS & CO. PÉLÉGRIN v. L. MESSEL & CO.*  
[1915] 1 Ch. 696
- *Donnelly's Estate, In re* [1913] 1 I. R. 177  
Followed. *In re CONNELL'S SETTLEMENT. In re BENETT'S TRUSTS. FAIR v. CONNELL* - [1915] 1 Ch. 867
- *Eley v. Positive Assurance Co.* (1876) 1 Ex. D. 20, 88.  
Referred to. *HICKMAN v. KENT OR ROMNEY MARSH SHEEP-BREEDERS' ASSOCIATION* - [1915] 1 Ch. 881
- *Elwes v. Payne* - (1879) 12 Ch. D. 468  
Distinguished. *HAILSHAM CATTLE MARKET COMPANY v. TOLMAN*  
[1915] 1 Ch. 360
- *Frost, In re* - - (1889) 43 Ch. D. 246  
Explained. *In re BULLOCK'S WILL TRUSTS. BULLOCK v. BULLOCK*  
[1915] 1 Ch. 493
- *Gatenby v. Morgan* - (1876) 1 Q. B. D. 685  
Followed. *In re JONES. LAST v. DOBSON* - [1915] 1 Ch. 246
- *General Billposting Co. v. Atkinson* [1908] 1 Ch. 537; [1909] A. C. 118.  
Distinguished. *KONSKI v. PEET*  
[1915] 1 Ch. 530
- *General Rolling Stock Co., In re* (1872) L. R. 7 Ch. 646.  
Discussed. *In re FLEETWOOD AND DISTRICT ELECTRIC LIGHT AND POWER SYNDICATE* - [1915] 1 Ch. 486
- *Goldsohl v. Goldman* - [1914] 2 Ch. 603  
Affirmed - - [1915] 1 Ch. 292

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- *Goodall's Settlement, In re* [1909] 1 Ch. 440  
Distinguished. *In re* JOHNSON. COW-  
LEY v. PUBLIC TRUSTEE [1915] 1 Ch. 435
- *Great Western (Forest of Dean) Coal Con-  
sumers Co., In re* (1882) 21 Ch. D. 769.  
Applied. *In re* CLANDOWN COLLIERY  
COMPANY — [1915] 1 Ch. 369
- *Greenwell v. Low Beechburn Coal Co.*  
[1897] 2 Q. B. 165.  
Distinguished. ATTORNEY-GENERAL  
v. ROE — [1915] 1 Ch. 235
- *Gresham Life Assurance Society v. Crowther*  
[1914] 2 Ch. 219.  
Affirmed — [1915] 1 Ch. 214
- *Grimthorpe (Lord), In re* [1908] 2 Ch. 675  
Distinguished. *In re* O'GRADY'S SET-  
TLEMENT. O'GRADY v. WILMOT  
[1915] 1 Ch. 613
- *Hadley, In re* — [1909] 1 Ch. 20  
Referred to. *In re* O'GRADY'S SETTLE-  
MENT. O'GRADY v. WILMOT  
[1915] 1 Ch. 613
- *Hall, In re* — (1885) 33 W. R. 508  
Distinguished. *In re* COTTER. JEN-  
NINGS v. NYE — [1915] 1 Ch. 307
- *Hallett's Estate, In re* (1880) 13 Ch. D. 696  
Distinguished. JAMES ROSCOE (BOL-  
TON), LIMITED v. WINDER  
[1915] 1 Ch. 62
- *Hamilton v. Hamilton* — [1892] 1 Ch. 396  
Followed. *In re* HARGROVE. HAR-  
GROVE v. PAIN — [1915] 1 Ch. 398
- *Haynes v. Ford* — [1911] 2 Ch. 237  
Explained. HAILSHAM CATTLE MAR-  
KET COMPANY v. TOLMAN  
[1915] 1 Ch. 360
- *Haynes v. Foster* — [1901] 1 Ch. 361  
Distinguished. *In re* TONGUE. *In re*  
BURTON. HIGGINSON v. BURTON  
[1915] 1 Ch. 390  
Not followed. *In re* HARGROVE. HAR-  
GROVE v. PAIN — [1915] 1 Ch. 398
- *Hearle v. Greenbank* (1749) 2 Atk. 695, 715  
Applied. *In re* VIRTE. VAIANA v.  
RUGLIONI DE VIRTE [1915] 1 Ch. 920
- *Heywood v. Heywood* — (1860) 29 Beav. 9  
Distinguished. *In re* JONES. LAST v.  
DOBSON — [1915] 1 Ch. 246
- *Hill's Trusts, In re* — (1880) 16 Ch. D. 173  
Overruled. *In re* DAWSON. PATTISSON  
v. BATHURST — [1915] 1 Ch. 626
- *Horne's Settled Estate, In re* (1888) 39  
Ch. D. 84.  
Distinguished. *In re* JOHNSON. COWLEY  
v. PUBLIC TRUSTEE — [1915] 1 Ch. 435
- *Hotchkys, In re* — (1886) 32 Ch. D. 408  
Distinguished. *In re* JOHNSON. COWLEY  
v. PUBLIC TRUSTEE [1915] 1 Ch. 435
- *Howard v. Howard* — (1856) 21 Beav. 550  
Followed. *In re* FISHER. ROBINSON  
v. EARDLEY — [1915] 1 Ch. 302

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- *Howell, In re ; In re Buckingham ; Liggins  
v. Buckingham* [1914] 2 Ch. 173.  
Reversed — [1915] 1 Ch. 241
- *Imperial Hydropathic Hotel Co. v. Hampson*  
(1882) 23 Ch. D. 1, 13.  
Observations in, followed and applied.  
HICKMAN v. KENT OR ROMNEY MARSH  
SHEEP-BREEDERS' ASSOCIATION  
[1915] 1 Ch. 881
- *Johnson v. Lyttle's Iron Agency* (1877) 5  
Ch. D. 687, 693.  
Observations in, followed and applied.  
HICKMAN v. KENT OR ROMNEY MARSH  
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[1915] 1 Ch. 881
- *Lassence v. Tierney* (1849) 1 Mac. & G. 551  
Principles of, applied. *In re* CONNELL'S  
SETTLEMENT. *In re* BENETT'S TRUSTS.  
FAIR v. CONNELL — [1915] 1 Ch. 867
- *Leslie, In re* — (1883) 23 Ch. D. 552  
Applied. *In re* JONES' SETTLEMENT.  
STUNT v. JONES — [1915] 1 Ch. 373
- *Limpus v. Arnold* — (1884) 15 Q. B. D. 300  
Observations of the Court of Appeal in,  
followed. *In re* TROLLOPE. GAME v.  
TROLLOPE — [1915] 1 Ch. 853
- *Love v. Bell* — (1884) 9 App. Cas. 286  
Discussed. BEARD v. MOIRA COLLIERY  
COMPANY, LIMITED — [1915] 1 Ch. 257
- *McEuen, In re* — [1913] 2 Ch. 704  
Referred to. *In re* WILLS. WILLS v.  
HAMILTON — [1915] 1 Ch. 769
- *Massy v. Rogers* — (1883) 11 L. R. Ir. 409  
Approved and followed. SPENCER v.  
NATIONAL ASSOCIATION FOR PREVEN-  
TION OF CONSUMPTION AND OTHER  
FORMS OF TUBERCULOSIS AND PRATT  
[1915] 1 Ch. 673
- *Melhado v. Porto Alegre Ry. Co.* (1874)  
L. R. 9 C. P. 503.  
Referred to. HICKMAN v. KENT OR  
ROMNEY MARSH SHEEP-BREEDERS'  
ASSOCIATION — [1915] 1 Ch. 881
- *Mitchell's Claim* — (1871) L. R. 6 Ch. 822  
Discussed. *In re* FLEETWOOD AND  
DISTRICT ELECTRIC LIGHT AND  
POWER SYNDICATE — [1915] 1 Ch. 486
- *Moore v. Cleghorn* (1847) 10 Beav. 423 ;  
on appeal (1848) 12 Jur. 591.  
Distinguished. *In re* JONES. LAST v.  
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- *Newdigate Colliery, In re* — [1912] 1 Ch. 468  
Distinguished. *In re* GREAT COBAR,  
LIMITED. BEESON v. THE COMPANY  
[1915] 1 Ch. 682
- *Normandy v. Ind, Coope & Co.* [1908] 1  
Ch. 84.  
See BAILLIE v. ORIENTAL TELEPHONE  
AND ELECTRIC COMPANY, LIMITED  
[1915] 1 Ch. 503
- *Norton, In re* — [1911] 2 Ch. 27  
Explained. *In re* HEWETT'S SETTLE-  
MENT. HEWETT v. ELDRIDGE  
[1915] 1 Ch. 810

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- *Offin v. Rochford Rural Council* [1906] 1 Ch. 342.  
Distinguished. *THORNHILL v. WEEKS* (No. 3) - - - [1915] 1 Ch. 106
- *O'Grady's Settlement, In re; O'Grady v. Wilmot* [1915] 1 Ch. 39.  
Reversed - - - [1915] 1 Ch. 613
- *Oxford Building and Investment Co., In re* (1883) 49 L. T. 495.  
Applied. *In re RUBBER AND PRODUCE INVESTMENT TRUST* [1915] 1 Ch. 382
- *Parl's Settlement, In re* - [1914] 1 Ch. 595  
Not followed. *In re BULLOCK'S WILL TRUSTS. BULLOCK v. BULLOCK* [1915] 1 Ch. 493
- *Peter v. Stirling* - (1878) 10 Ch. D. 279  
Distinguished. *In re SCOTT. SCOTT v. SCOTT* - - - [1915] 1 Ch. 592
- *Phillimore's Estate, In re* [1904] 2 Ch. 460.  
Applied. *In re TRAFFORD'S SETTLED ESTATES* - - - [1915] 1 Ch. 9
- *Phillips v. Beal* - (1862) 32 Beav. 26  
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- *Pritchard's Case* - (1873) L. R. 8 Ch. 956  
Referred to. *HICKMAN v. KENT OR ROMNEY MARSH SHEEP-BREEDERS' ASSOCIATION* - [1915] 1 Ch. 881
- *Radford & Bright, Ltd., In re* [1901] 1 Ch. 272, 735.  
Referred to. *In re RUBBER AND PRODUCE INVESTMENT TRUST* [1915] 1 Ch. 382
- *Rex v. Norfolk County Council* [1901] 2 K. B. 268.  
Distinguished. *THORNHILL v. WEEKS* (No. 3) - - - [1915] 1 Ch. 106
- *Rhodesia Goldfields, In re* [1910] 1 Ch. 239.  
Discussed. *In re SMELTING CORPORATION. SEAVER v. THE COMPANY* [1915] 1 Ch. 472
- *Roberts v. Kilmore (Bishop of)* [1902] 1 I. R. 333.  
Distinguished. *In re JONES. LAST v. DOBSON* - - - [1915] 1 Ch. 246
- *Ross, In re* - - - [1900] 1 Ch. 162  
The principles of, followed. *In re DEMPSTER. BORTHWICK v. LOVELL* [1915] 1 Ch. 795
- *Salmon v. Quin & Axtens, Ltd.* [1909] 1 Ch. 311, 318.  
Observations in, followed and applied. *HICKMAN v. KENT OR ROMNEY MARSH SHEEP-BREEDERS' ASSOCIATION* [1915] 1 Ch. 881
- *Sampson, In re* - - - [1896] 1 Ch. 630  
Applied. *In re JENKINS. WILLIAMS v. JENKINS* - - - [1915] 1 Ch. 46

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- *Sanders' Trusts, In re* (1866) L. R. 1 Eq. 675.  
Followed. *In re JONES. LAST v. DOBSON* - - - [1915] 1 Ch. 246
- *Schweder, In re* [1893] W. N. 12; 37 Sol. J. 249.  
Not followed. *In re TROLLOPE. GAME v. TROLLOPE* - [1915] 1 Ch. 853
- *Scott, In re; Scott v. Scott* [1914] 1 Ch. 847.  
Affirmed - - - [1915] 1 Ch. 592
- *Shewen v. Vanderhorst* (1831) 1 Russ & My. 347; 2 Russ. & My. 75.  
Applied. *In re FLEETWOOD AND DISTRICT ELECTRIC LIGHT AND POWER SYNDICATE* - [1915] 1 Ch. 486
- *Shirley v. Fisher* - (1882) 47 L. T. 109  
Distinguished. *In re JONES' SETTLEMENT. STUNT v. JONES* [1915] 1 Ch. 373
- *Simcoe, In re* - - - [1913] 1 Ch. 552  
Distinguished. *In re LORD LAWRENCE. LAWRENCE v. LAWRENCE* [1915] 1 Ch. 129
- *Sinclair, In re* - - - [1897] 1 Ch. 921  
Distinguished. *In re DEMPSTER. BORTHWICK v. LOVELL* [1915] 1 Ch. 795
- *Smith-Bosanquet's Settled Estates, In re* (1912) 107 L. T. 191.  
Followed. *In re MARYON-WILSON'S SETTLED ESTATES. MARYON-WILSON v. DU CANE* - [1915] 1 Ch. 29
- *Somes, In re* - - - [1896] 1 Ch. 250  
Referred to. *In re JONES' SETTLEMENT. STUNT v. JONES* [1915] 1 Ch. 373
- *South African Territories v. Wallington* [1898] A. C. 309.  
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- *South Llanharra Colliery Co., In re* (1879) 12 Ch. D. 503.  
Distinguished. *In re MENELL ET CIE., LIMITED. REGENT STREET FUR COMPANY, LIMITED v. DIAMANT* [1915] 1 Ch. 759
- *Stamford (Earl of), In re* [1896] 1 Ch. 288  
Followed. *In re COTTER. JENNINGS v. NYE* - - - [1915] 1 Ch. 307
- *Thatcher's Trusts, In re* (1859) 26 Beav. 365.  
Followed. *In re HEWETT'S SETTLEMENT. HEWETT v. ELDRIDGE* [1915] 1 Ch. 810
- *Thornhill v. Weeks* (No. 2) [1913] 2 Ch. 464, 468.  
Followed. *THORNHILL v. WEEKS* (No. 3) - - - [1915] 1 Ch. 106



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- *Tongue, In re* - - [1915] 1 Ch. 390  
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- *Vardon's Trusts, In re* (1885) 31 Ch. D. 275  
Explained. *In re* HARGROVE. HARGROVE v. PAIN - [1915] 1 Ch. 398
- *Wagstaff's Settled Estates, In re* [1909] 2 Ch. 201.  
Followed. *In re* JOHNSON. COWLEY v. PUBLIC TRUSTEE - [1915] 1 Ch. 435
- *Walker v. Murphy* - [1914] 2 Ch. 293  
Affirmed - - [1915] 1 Ch. 71
- *Waugh's Trusts, In re* [1877] W. N. 114 ;  
46 L. J. (Ch.) 629.  
*See In re* JONES' SETTLEMENT. STUNT v. JONES - [1915] 1 Ch. 373, 381, n.
- *Welton v. Saffery* - [1897] A. C. 299, 315  
Observations in, followed and applied.  
HICKMAN v. KENT OR ROMNEY MARSH SHEEP-BREEDERS' ASSOCIATION  
[1915] 1 Ch. 881
- *Wenham, In re* - - [1892] 3 Ch. 59  
Applied. *In re* FLEETWOOD AND DISTRICT ELECTRIC LIGHT AND POWER SYNDICATE - [1915] 1 Ch. 486
- *Wheatley, In re* - (1884) 27 Ch. D. 606  
Followed. *In re* HARGROVE. HARGROVE v. PAIN - [1915] 1 Ch. 398
- *Whitting v. Whitting* (1908) 53 Sol. J. 100  
Observations on. *In re* BULLOCK'S WILL TRUSTS. BULLOCK v. BULLOCK  
[1915] 1 Ch. 493
- *Wood v. Odessa Waterworks Co.* (1889) 42 Ch. D. 636, 642.  
Observations in, followed and applied.  
HICKMAN v. KENT OR ROMNEY MARSH SHEEP-BREEDERS' ASSOCIATION  
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**CATTLE**—Town moor—Freemen's right to depasture cattle on moor—Stint tickets—Transferees of stint tickets—Temperance festival on moor—Roundabouts and shows—"Fair"—Injury to herbage—Injunction—Measure of damages— 71  
*See* TOWN MOOR.

**CHARGE**—Revenue—Settled estate—Increment value duty—Reversion duty—Payable out of capital moneys—Expenditure—"Reasonably incurred"—Accounts—Returns—Valuations - - - 29  
*See* REVENUE. 2.

**CHARITY**—Animals—Will—Trust "for the Protection and Benefit of Animals"—Validity.

A testatrix by her will gave her residue upon trust (in the judgment of this Court, differing with Warrington J.) to apply the same for the protection and benefit of animals :—

*Held*, a good and valid charitable trust, on the ground that it was calculated to promote public morality by checking the innate tendency to cruelty. *In re* WEDGWOOD. ALLEN v. WEDGWOOD - - - C. A. 113

**CHARITY—continued.**

— Charitable legacy—Will—Gift to vicar—Condition—Repair of tombstones—Gift over on default in repairing to non-charitable object—Perpetuities—Police "superannuation fund"—Police "pension fund" - - - 543  
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— Will—Construction—Charitable legacies—Declaration that trustee shall decide any question of disputed identity—Jurisdiction of Court—Latent ambiguity—Evidence of intention - 673  
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**CHATTELS**—Legal limitations to life tenant and remainderman—Death of tenant for life—Chattels lost or injured—Liability of estate of tenant for life - - 829  
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*See* under BANK.

**CHILDREN**—Will—Construction.

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**CINEMATOGRAPH**—Exhibition—Projection of Films on Screen for Inspection by intending Purchasers or Hirers—Cinematograph Act, 1909 (9 Edw. 7, c. 30), ss. 1, 7.

The Cinematograph Act, 1909, forbids an exhibition of pictures by means of a cinematograph to be given unless the regulations of the Secretary of State for securing safety are observed, or in any place other than in licensed premises :—

*Held*, that the showing of films on a screen by dealers or their agents, to intending purchasers or hirers only, does not amount to giving an exhibition within the meaning of the Act. ATTORNEY-GENERAL v. VITAGRAPH COMPANY, LIMITED - - Astbury J. 206

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**COMMITTEE OF INSPECTION—Company—**

Winding-up—Appointment of solicitor— — — — — 192  
See COMPANY. 14.

— Company—Winding-up—Liquidator—  
Removal—"Cause shown"— — — 382  
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**COMPANY—Articles—Contract—Action by Member to enforce his Ordinary Rights—Arbitration Clause—Application by Company to stay—Sufficient Submission—Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 4, 27—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 14, sub-s. 1.**

The true interpretation of the apparently conflicting decisions and dicta on s. 16 of the Companies Act, 1862 (25 & 26 Vict. c. 89), re-enacted by s. 14, sub-s. 1, of the Companies (Consolidation) Act, 1908, is that though articles of association can neither constitute a contract between a company and an outsider, nor give any individual member special contractual rights beyond those of the members generally—*Pritchard's Case* (1873) L. R. 8 Ch. 956; *Melhado v. Porto Alegre Ry. Co.* (1874) L. R. 9 C. P. 503; *Eley v. Positive Life Assurance Co.* (1876) 1 Ex. D. 20, 88; *Browne v. La Trinidad* (1887) 37 Ch. D. 1—they do in fact constitute a contract between a company and its members in respect of their ordinary rights as members.

Observations in *Imperial Hydropathic Hotel Co., Blackpool v. Hampson* (1882) 23 Ch. D. 1, 13; *Johnson v. Lyttle's Iron Agency* (1877) 5 Ch. D. 687, 693; *Bradford Banking Co. v. Briggs* (1886) 12 App. Cas. 29, 33; *Wood v. Odessa Waterworks Co.* (1889) 42 Ch. D. 636, 642; *Salmon v. Quin & Axtens, Ltd.* [1909] 1 Ch. 311, 318; *Welton v. Saffery* [1897] A. C. 299, 315; and *Bisgood v. Henderson's Transvaal Estates* [1908] 1 Ch. 743, 759, followed and applied.

An article providing for the reference of disputes to arbitration is a sufficient submission in writing within the Arbitration Act, 1889, ss. 4, 27.

*Baker v. Yorkshire Fire and Life Assurance Co.* [1892] 1 Q. B. 144 applied. **HICKMAN v. KENT OR ROMNEY MARSH SHEEP-BREEDERS' ASSOCIATION— — — — Astbury J. 881**

**2. — Debenture Stock—Trust Deed—Distribution of Assets by Trustees—Partly paid Stock—Rights of Holders.**

In 1902 a company issued debenture stock payable by the instalments mentioned in the application form, which were all called up by May, 1903.

The trust deed securing the stock provided for a distribution of the net proceeds of any sale thereunder first in payment of arrears of interest in proportion to the amount due, and secondly in payment of principal in proportion to the stock held by the stockholders.

All the stockholders were entered on the register and received certificates for the full amount of stock allotted, but several had not paid their instalments.

The trustees had realized the security and were distributing the assets, and the question

**COMPANY—continued.**

arose whether the partly paid stockholders could participate without notionally bringing in their unpaid instalments in accordance with the principle of *Cherry v. Boultbee* (1839) 4 My. & Cr. 442:—

*Held*, that the transaction simply amounted to a contract to make a loan by instalments to the company on the security of debenture stock, which contract prior to the Companies Act, 1907 (7 Edw. 7, c. 50), s. 16, re-enacted by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 105, was not enforceable either in debt or specific performance, but only in damages: *South African Territories v. Wallington* [1898] A. C. 309.

As therefore the unpaid instalments did not constitute a debt to the company or the trustees, the principle of *Cherry v. Boultbee* was inapplicable, and the partly paid stockholders were entitled to a rateable distribution in respect of the loans they had actually made.

*In re Akerman* [1891] 3 Ch. 212; *In re Abrahams* [1908] 2 Ch. 69; and *In re Rhodesia Goldfields* [1910] 1 Ch. 239 discussed. *In re SMELTING CORPORATION. SEAVER v. THE COMPANY— — — — Astbury J. 472*

**3. — Debenture Issue—Assurance Society Trustees of Debenture Trust Deed—Debentures guaranteed by Assurance Society—Re-insurance of Risk—Liquidation of Company and of Society—Debenture-holders' Claim to Re-insurance Moneys.**

A brewery company made a debenture issue with a trust deed of which an assurance society were the trustees. By a contract indorsed on each debenture the society guaranteed the registered holder payment of the principal and interest secured by the debenture if the brewery company should make default. The society received for this guarantee a consideration in the nature of an annual premium, and also an annual fee for acting as trustees, the payment of which was provided for by the trust deed. The society then re-insured part of their risk under their guarantee with another insurance company. Subsequently both the brewery company and the society went into liquidation, and the debentures remained unpaid.

A purchaser of all the debentures of the brewery company proved in the liquidation of the society for the amount due under the debentures after deducting the value of his securities, and his proof was admitted. He also claimed to be entitled, as against the general creditors of the society, to the benefit of all re-insurances effected by the society in connection with the debentures:—

*Held*, that he was not so entitled. Although under the trust deed there was a fiduciary relation between the society and the debenture-holders, there was no fiduciary relation between them under the contract by which the payment of the debentures was guaranteed. *In re LAW GUARANTEE TRUST AND ACCIDENT SOCIETY. GODSON'S CLAIM— — — — Neville J. 340*

**4. — Debenture-holders' Action—Appointment of Receiver and Manager—Contract by**

**COMPANY—continued.**

*Company with Agent to sell on Commission—Onerous Contract—Application for Leave for Manager to disregard—No Opposition by Company—Goodwill of no Value—Practice.*

On May 23, 1906, the defendant company entered into an agreement with certain agents by which it was agreed that the latter should for a period of fifteen years from January 1, 1907, be the sole agents of the company for the whole world for the sale of copper and silver from the company's mines which the company might desire to sell on certain terms as to commission. On May 24, 1906, a prospectus was issued by the company inviting subscriptions for debentures in which the agreement with the agents was mentioned amongst the scheduled contracts. The debentures which were subsequently issued were in the ordinary form of a charge on the undertaking of the company, but were in no way made subject to the performance of the agreement. In 1914 the plaintiff, who was a debenture-holder, obtained the usual order in a debenture-holder's action, and a receiver and manager of the assets of the company was appointed. The assets of the company were insufficient to satisfy the claims of the debenture-holders, and the goodwill of the company's business was of no value.

On an application by the plaintiff, to which no opposition was offered by the company, for an order that the receiver and manager might be at liberty to disregard the agreement of May 23, 1906:—

*Held*, that the agreement being one which in no way affected the goodwill of the company's business, there was no obligation on the receiver and manager, morally or otherwise, to carry it into effect, and that the order asked for ought to be made.

*In re Newdigate Colliery* [1912] 1 Ch. 468 distinguished. *In re GREAT COBAR, LIMITED. BEESON v. THE COMPANY* — **Warrington J. 682**

**5. — Debenture-holder's Action — Foreclosure—Appointment of Receiver and Manager—Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 78), s. 1, sub-s. 1 (b)—Courts (Emergency Powers) Rules, 1914, r. 4.**

A debenture-holder can issue a writ of summons claiming the usual relief in a debenture-holder's action and move for the appointment of a receiver and manager without any application to the Court under the Courts (Emergency Powers) Act, 1914.

Observations on the word "foreclose" in s. 1, sub-s. 1 (b), of the Act. *In re FARNOL EADES IRVINE & CO., LIMITED. CARPENTER v. THE COMPANY* — **Warrington J. 22**

**6. — Dividends — Purchase of Undertaking of Vendor Company—Guarantee Fund to secure Payment of Dividends—Agreement that Vendor Company should provide Fund out of Purchase-money—Deposit of Fund in Names of Trustees—Return of Capital to Shareholders—Winding up of Purchasing Company—Rights of Creditors.**

By an agreement dated February 10, 1913, the R. company agreed to purchase the business

**COMPANY—continued.**

and undertaking of the M. company. By the purchase agreement the vendor company guaranteed that the net profits of the purchasing company in respect of the business should amount to not less than 10 per cent. per annum on the paid-up capital of the shares subscribed for by the public in connection with a proposed issue which the purchasing company intended to make, and the vendor company undertook that if there should not be during the first year of the purchasing company's trading sufficient to pay a dividend of 10 per cent. per annum on such shares they would pay to the purchasing company such sum as together with the profits received by the company would make the sum available for distribution in dividend sufficient to pay 10 per cent. per annum on the subscribed shares. The vendor company also agreed to pay a sum equal to 10 per cent. in cash on the total amount of the shares subscribed as aforesaid, such sum to be paid out of the purchase-money into a bank in the joint names of the vendor company and two trustees for the purchasing company, and should be held by them in trust to secure the performance of the guarantee aforesaid and subject thereto for the vendor company absolutely. In June, 1913, at a meeting of the directors of the purchasing company it was resolved that a cheque should be drawn for the sum of 384*l.* 6*s.*, being the amount of 10 per cent. on the shares subscribed for by the public, such sum to be deemed as a payment on account of the purchase-money under the agreement with the vendor company, and that D. and M. (two of the directors of the purchasing company) should be the trustees of the deposit. Shortly afterwards the 384*l.* 6*s.* was paid by the purchasing company into a bank to an account in the joint names of D. and M. In February, 1914, the purchasing company was ordered to be wound up. On an application by its liquidator for the determination of the question whether the sum deposited formed part of the assets of the purchasing company or whether the contributories of such company had any interest in such sum:—

*Held*, that, there being no liability under the agreement on the part of the vendor company to make the deposit except out of the purchase-money, the money was the property of the purchasing company, formed part of its general assets, and was divisible amongst its creditors.

*In re South Llanharra Colliery Co. (1879)* 12 Ch. D. 503 distinguished. *In re MENELL ET CIE., LIMITED. REGENT STREET FUR COMPANY, LIMITED v. DIAMANT*

**Warrington J. 759**

**7. — Debentures—Power for Majority of registered Debenture-holders to appoint a Receiver—Fiduciary Power—Equitable Mortgagees by Deposit of Debentures—Appointment of Receiver by Nominal Majority—Jurisdiction of Court.**

A company made a debenture issue without a trust deed. The conditions indorsed on each debenture provided (inter alia) that the company should recognize only the registered holder for the time being of the debenture, and that the



**COMPANY—continued.**

registered holder might with the written consent of the majority of the debenture-holders appoint a receiver of the property charged by the debenture. In January, 1914, the debentures matured and remained unpaid. At this date the registered holders of the debentures were four parties, three of whom were shareholders of the company. The fourth party were the bankers of the company who, as registered holders of debentures and also as equitable mortgagees by deposit of some of the debentures of one of the other parties, held the majority of the debentures as security for the company's overdraft, and threatened proceedings. The other three parties who formed the majority of the registered debenture-holders thereupon, without notice to the bankers, in exercise of the power in the debentures appointed a receiver. On the application of the bankers:—

*Held*, that, notwithstanding the bargain between the debenture-holders, the Court had jurisdiction on the evidence to appoint a receiver, its own officer, to realize the security under the control of the Court. *In re "SLOGGER" AUTOMATIC FEEDER COMPANY, LIMITED. HOARE v. THE COMPANY* — **Neville J. 478**

**8. — Memorandum of Association — Construction — Power to sell for Shares in New Company — Union of Interests or Amalgamation.**

The plaintiff company carried on the business of brick manufacturers at Wellington, Somerset, having a branch property and business at Taunton adjoining certain other brick works belonging to the C. company, which carried on a similar business to that of the plaintiff company. By its memorandum of association the plaintiff company had power to sell or otherwise deal with all or any part of its property "in such manner and on such terms and for such purposes" as it should think proper, and also to "make and carry into effect arrangements with respect to the union of interests, or amalgamation, either in whole or in part, with any other company" having similar objects. It was proposed that the plaintiff company and the C. company should sell their Taunton businesses to a new company to be formed for that purpose in consideration of shares or debentures in the new company, the plaintiff company and the C. company also providing the necessary working capital by applying and paying for shares or debentures in the new company. On a summons under Order LIVA to determine whether the plaintiff company could validly carry out the proposed arrangement:—

*Held*, that on the true construction of its memorandum of association the plaintiff company had power to sell its Taunton business in consideration of shares or debentures in the new company, and to provide working capital in the way proposed. *In re WILLIAM THOMAS & CO., LIMITED. WILLIAM THOMAS & CO., LIMITED v. SULLY* — **Warrington J. 325**

**9. — Mortgages—Registration — Unregistered Mortgage—Notice—Priority—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 93.**

Sect. 93 of the Companies (Consolidation) Act, 1908, avoids an unregistered mortgage as

**COMPANY—continued.**

against a subsequent registered incumbrancer even though he had express notice of the prior mortgage at the time when he took his own security.

Decision of Astbury J. reversed. *In re MONOLITHIC BUILDING COMPANY. TACON v. THE COMPANY* — **C. A. 643**

**10. — Prospectus — Misrepresentations — Directors—Liability—Reasonable Ground for believing Statements to be true—Uncorroborated Statements of Promoter—Damages—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 84.**

In an action by a shareholder against the directors of a company to recover damages for misrepresentations in the prospectus on the faith of which he had taken shares, the directors pleaded as a defence that they had reasonable grounds for believing, and did believe, the impugned statements to be true:—

*Held*, that the uncorroborated statements of a vendor and promoter afford, by themselves, no reasonable ground for believing them to be true.

The existence of a reasonable ground for belief in the truth of any statement is established by the proof of any facts or circumstances which would induce that belief in the mind of a reasonable man, that is to say, a man who stands midway between the careless and the over-cautious man.

Duties and obligations of directors to test accuracy of statements in a prospectus discussed. *ADAMS v. THRIFT* — **Eve J. 557**

**11. — Shareholders — General Meeting — Alteration of Articles — Special Resolution — Notice—Sufficiency—General Nature of Business — Non-disclosure — Directors' Remuneration — Action by Shareholders—Right to sue.**

The directors of the O. company were also directors of a subsidiary company in which the O. company held practically the whole of the shares. In 1907 the directors, in exercise of the voting powers of the O. company in the subsidiary company, obtained the passing of resolutions whereby the articles of association of the subsidiary company were altered so as to increase the fixed remuneration of the directors and also to give them a percentage of the net profits. In 1913 the auditors of the O. company drew attention to the fact that the receipt by the directors of remuneration in the capacity of directors of the subsidiary company ought to be sanctioned by the shareholders. An extraordinary general meeting of the shareholders of the O. company was then convened by the directors with the object of passing special resolutions ratifying what had been done by the directors in 1907, authorizing them to retain all remuneration received and to be received by them as directors of the subsidiary company under its articles as modified in 1907, and altering the articles of the O. company by allowing its directors to receive remuneration as directors of subsidiary companies without being accountable for the same, and to exercise the voting powers conferred by them in such companies as they thought fit. The notice convening the meeting was accompanied by a circular. The notice set out the



**COMPANY—continued.**

proposed resolutions, but neither the notice nor the circular gave particulars as to the amount (which was very large) of the remuneration which had been received by the directors in respect of the subsidiary company. The resolutions were passed by the requisite majority and subsequently confirmed.

In an action by a shareholder, on behalf of himself and all the other shareholders of the O. company, for a declaration that the resolutions were not binding on the ground of insufficient notice of the meeting at which they were passed, and for an injunction to restrain the company and the directors from acting upon them, the plaintiff moved for an interim order. *Astbury J.*, following *Normandy v. Ind, Coope & Co.* [1908] 1 Ch. 84, dismissed the motion on the ground that the plaintiff had no right to sue on behalf of himself and the other shareholders without joining the company as plaintiffs:—

*Held*, on appeal, that the action was maintainable by the plaintiff; that the notice did not give a sufficiently full and frank disclosure to the shareholders of the facts upon which they were asked to vote; and that the resolutions were invalid and not binding upon the company. *BAILLIE v. ORIENTAL TELEPHONE AND ELECTRIC COMPANY, LIMITED* — **C. A. 503**

**12. — Voluntary Winding-up — Surplus Assets—Distribution—Statute-barred Creditors — Liquidator willing to pay — Opposition by Shareholders—Summons by Liquidator—Order to apply “in a due course of administration” — Subsequent Payment to Statute-barred Creditors — Propriety of Payment—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 186.**

A voluntary liquidator having surplus assets available for distribution issued a summons to determine (inter alia) whether he was at liberty to pay statute-barred creditors thereout.

At the hearing of the summons the statute-barred creditors contended that he was, and the shareholders that he was not, at liberty to do so.

The Court declined to answer the question specifically but directed the liquidator to apply the assets “in a due course of administration.”

The liquidator having subsequently paid certain statute-barred creditors, the shareholders issued another summons to determine whether it was a proper payment:—

*Held*, that, having regard to the shareholders' objection formally taken on the first summons, and to the order made thereon, the payment to the statute-barred creditors was improper.

*Ex parte Dewdney* (1809) 15 Ves. 479, 498; *Sheven v. Vanderhorst* (1831) 1 Russ. & My. 347; 2 Russ. & My. 75; *Phillips v. Beal* (1862) 32 Beav. 26; and *In re Wenham* [1892] 3 Ch. 59 applied.

Whether apart from these circumstances the voluntary liquidator would have been justified in paying statute-barred creditors under the Companies (Consolidation) Act, 1908, s. 186, quære.

*In re General Rolling Stock Co.* (1872) L. R. 7 Ch. 646 and *Mitchell's Claim* (1871) L. R. 6 Ch. 822 discussed. *In re FLEETWOOD AND DISTRICT ELECTRIC LIGHT AND POWER SYNDICATE* — — — **Astbury J. 486**

**COMPANY—continued.**

**13. — Winding-up—Petition of Unsecured Creditors—Assets covered by Debentures—Business really carried on by Debenture-holder—Opposition of Large Majority of Unsecured Creditors—Special Circumstances—Just and equitable—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 129, 141, 145, 219.**

The business of a company which to the board's knowledge was hopelessly insolvent was being carried on in the company's name solely for the benefit of the chairman, who held all the 10,000l. debentures and was also an unsecured creditor for 10,000l. out of 13,597l. unsecured debts. The petitioners, who were unaware of this insolvency, were induced by the company to supply goods on credit, but when they obtained leave to sign judgment for their debt the chairman appointed a receiver, so that their judgment was fruitless.

The petitioners accordingly applied for a winding-up order. They were supported by a few trade creditors in a similar position, but the petition was opposed by the chairman, and by a large majority of other unsecured creditors who gave no reasons for their opposition:—

*Held*, in the special circumstances, that it was just and equitable that the company should be wound up.

*In re Alfred Melson & Co.* [1906] 1 Ch. 841, 844, and *In re Great Western (Forest of Dean) Coal Consumers Co.* (1882) 21 Ch. D. 769 applied. *In re CLANDOWN COLLIERY COMPANY*

**Astbury J. 369**

**14. — Winding-up—Practice—Committee of Inspection—Appointment of Solicitor—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 151, sub-s. 1 (c); s. 158, sub-s. 1; s. 160, sub-s. 9.**

Though s. 151 of the Companies (Consolidation) Act, 1908, enables a liquidator, in a winding-up by the Court, to employ a solicitor with the sanction either of the committee of inspection or the Court, he is not justified in obtaining from the Court *ex parte* its sanction to the appointment of a solicitor to whom he knows the committee of inspection object. He is bound by s. 158, sub-s. 1, to have regard to their directions, and if he thinks their directions unwise he can summon meetings of creditors or contributories to override them under s. 158, sub-s. 2. *In re CONSOLIDATED DIESEL ENGINE MANUFACTURERS, LIMITED* — — **Neville J. 192**

**15. — Winding-up—Liquidator—Removal — “Cause shown”—Committee of Inspection—Removal—Jurisdiction—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 149, 152.**

A winding-up order was made on a contributories' petition containing serious charges of misfeasance against the directors, and a liquidator and committee of inspection nominated by the contributories were appointed with the view of making a thorough investigation.

At that time the company was apparently solvent with a balance for the contributories which might be increased by misfeasance proceedings. Subsequently, however, a very heavy claim was admitted and it was found that the

**COMPANY—continued.**

company, notwithstanding the amount possibly recoverable in misfeasance proceedings, was hopelessly insolvent.

The liquidator and committee of inspection, acting quite bona fide and in pursuance of what they believed to be their duty under the order appointing them, continued to treat the liquidation as a contributories' liquidation and proposed to spend the creditors' assets in misfeasance proceedings against the wishes of the creditors.

The creditors applied to remove the liquidator and the committee of inspection :—

*Held*, that there was sufficient "cause shown" for removing the liquidator under the Companies (Consolidation) Act, 1908, s. 149, sub-s. 6.

*In re Oxford Building and Investment Co.* (1883) 49 L. T. 495 and *In re Adam Eytton, Ltd.* (1887) 36 Ch. D. 299 applied.

*Semble* if the present committee of inspection did not act in harmony with the new liquidator appointed on behalf of the creditors, the Court would have jurisdiction to remove them by the indirect method suggested in *In re Radford & Bright, Ltd.* [1901] 1 Ch. 272, 735, namely, by resummoning the first meetings of the creditors and contributories under s. 152, and then appointing the creditors' nominees. *In re RUBBER AND PRODUCE INVESTMENT TRUST* — **Astbury J. 382**

16. — *Winding-up Petition* — *Leave to present—Judgment Creditor—Equitable Execution*—"Proceed to the enforcement of any judgment"—*Courts (Emergency Powers) Act, 1914* (4 & 5 Geo. 5, c. 78), s. 1, sub-s. 1 (a).

By the Courts (Emergency Powers) Act, 1914, s. 1, sub-s. 1, "From and after the passing of this Act no person shall—(a) proceed to execution on, or otherwise to the enforcement of, any judgment or order of any Court . . . for the payment or recovery of a sum of money . . . except after such application to such Court and such notice as may be provided by rules or directions under this Act":—

*Held* (reversing the decision of *Astbury J.*), that a winding-up petition was neither a proceeding to execution nor a proceeding to the enforcement of a judgment within the meaning of this sub-section. *In re A COMPANY* [0022 OF 1915]. *In re A COMPANY* [0023 OF 1915]

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— *Employer and workman—Liability of insurance company—Employer insured—Continued liability of employer—Both employer and insurance company in liquidation—Right of proof for compensation* — — — — — **26**  
*See EMPLOYER AND WORKMAN.*

— *Railway company.*  
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— *Will—Charitable legacy—Debentures of Australian land company—Floating security—Office in London—"Interest in land" in England of no value—Apportionment* — — — — — **626**  
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— *Will—Construction—Shares in limited company—Indefinite gift of net profits of commercial undertakings—Advances—Interest in partnership* — — — **408**  
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**COMPENSATION** — *Election—Spinster—Restraint on anticipation* — — — **390**  
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**COMPULSORY LICENCE**—*Petition for—Patent*  
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**COMPULSORY PURCHASE** — *Lands Clauses Acts—Injunction—Special Act—Provision against interference with main structure of building—"Take or interfere with"—Destruction of access to church* — — — — — **1**  
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**CONDITION**—*Will—Charitable legacy—Gift to vicar and his successors—Condition—Repair of tombstones—Gift over on default in repaying to non-charitable object—Perpetuities—Police "superannuation fund"—Police "pension fund"*  
*See WILL. 7.* **543**

**CONFLICT OF LAWS**—*Lunacy—Foreign Lunatic not so found—Provisional Administrator—Order of French Court—Securities in Hands of English Bailees—Refusal to deliver without Order of English Court—Costs of Action.*

A domiciled Frenchman resident in Paris deposited securities for safe custody with the defendants in London. He afterwards became a person of unsound mind not so found, and a provisional administrator of his property was appointed by the French Court with express power to receive the securities in question. The defendants, however, when requested to do so refused to act on the order of the French Court and insisted on an action being brought in the English Court, in which they submitted to act as the Court should direct, but claimed to retain their costs of the action. There were no lunacy proceedings in England:—

*Held*, that, having regard to the decision of the Court of Appeal in *Didisheim v. London and Westminster Bank* [1900] 2 Ch. 15, the defendants, in refusing to act on the order of the French Court, had shown an undue and unreasonable excess of caution and ought to bear their own costs of the action. *PÉLÉGRIN v. COUTTS & CO. PÉLÉGRIN v. L. MESSEL & CO.*  
**Sargent J. 696**

2. — *Will—Personal Estate—Law of Holland restricting Testamentary Capacity—Subsequent Acquisition of English Domicil giving enlarged Testamentary Capacity—Effect on former Will.*

Testatrix, by her will made in the Dutch

**CONFLICT OF LAWS**—*continued.*

language and duly executed according to the law of Holland, appointed her intended husband as heir of her estate, "with reservation only of the legitimate portion or the lawful share coming to her relations in a direct line in so far as they may exist at her death and may be competent and able to inherit from her." At the date of her will both the testatrix and her intended husband were of Dutch nationality and domiciled in Holland. After their marriage (which under the law of Holland did not revoke the previous will) they acquired an English domicile, the husband becoming a naturalized British subject. The testatrix died in 1903 possessed of personal estate only and leaving her husband and five children her surviving. According to the law of Holland three-fourths of her estate would, under the circumstances, have been distributable amongst her children as their legitimate portion and one-fourth only have been disposed of by the will in favour of her husband:—

*Held*, that, the testamentary capacity of the testatrix at the date of her death having been enlarged by her acquisition of an English domicile, her husband became entitled under the will to the whole of her estate. *In re Bridger* [1894] 1 Ch. 297 followed and applied. *In re Groos*. *GROOS v. GROOS* - - - **Sargant J. 572**

**CONSENT**—Settled land—Sale—Persons qualified to consent - - - **443**  
*See SETTLED LAND. 1.*

— Underlease, Agreement for—Covenant not to assign without consent—Breach—Covenant running with land—Assigns *See LESSOR AND LESSEE. 549*

**CONTINGENCY**—Will—Construction—Bequest for life—Remainder to two persons—Should one die before the other, survivor to take the whole—Reading in contingency - - - **302**  
*See WILL. 2.*

**CONTINGENT INTEREST**—Power of appointment amongst issue—Appointment of income for benefit of lunatic child—Rule against perpetuities - - - **347**  
*See SETTLEMENT. 3.*

**CONTRACT**—Company—Debenture-holders' action—Appointment of receiver and manager—Onerous contract—Application for leave for manager to disregard—No opposition by company—Goodwill of no value - - - **682**  
*See COMPANY. 4.*

— Marriage contract—Scotch form—Foreign settlement—Matrimonial domicile—English husband and Scotch wife—Trustees, beneficiaries, and securities all English - - - **228**  
*See TRUSTEE. 2.*

— Motor car—Lien—Agreement to keep in repair and supply owner with chauffeur and materials—Receiver - - - **621**  
*See LIEN.*

**CONTRACT**—*continued.*

— Restraint of trade—Master and servant—Breach by partnership firm—Repudiation of contract - - - **530**  
*See RESTRAINT OF TRADE. 2.*

— Vendor and purchaser.  
*See under VENDOR AND PURCHASER.*

**CONTRIBUTION**—Election—Will—Administration—Husband and wife—Mortgage of property belonging to wife—Election of wife to take under will—Liability of property brought in by election for debts—Incidence of contribution as between beneficiaries - - - **450**  
*See ELECTION. 4.*

**CONVERSION**—Land settled in trust for sale—Mortgage of proceeds of sale—Registrability—Registry Acts, Yorkshire - **214**  
*See REGISTRY ACTS.*

— Real estate—Trust for sale—Reconversion—Estate duty—Incidence - - - **613**  
*See SETTLEMENT. 4.*

— Will—Trust for conversion—Power to postpone—Conversion—Tenant for life and remainderman - - - **187**  
*See WILL. 19.*

**CONVEYANCING AND LAW OF PROPERTY**—Sale of incumbered land free from incumbrances—Discharge of land by payment into Court - - - **94**  
*See VENDOR AND PURCHASER. 2.*

**COSTS**—District council—Public right of way—Obstructions—Removal by private individuals—Action by landowners—Resolution of district council to defend action - - - **106**  
*See LOCAL GOVERNMENT.*

— Lunacy—Order of French Court—Securities in hands of English bailees—Refusal to deliver without order of English Court—Costs of action - - - **696**  
*See CONFLICT OF LAWS. 1.*

— Solicitors' costs.  
*See under SOLICITOR.*

— Trading with the enemy—Practice—Parties to summons - - - **848**  
*See TRADING WITH THE ENEMY.*

— Trustees' "costs of management"—Settlement—Equitable tenant for life and remainderman—Freehold ground rents—Repairing leases—Costs of survey—Costs of serving notices to repair on lessees - - - **540**  
*See SETTLEMENT. 4. 1.*

**COURTS (EMERGENCY POWERS)**—Company—Debenture-holder's action—Foreclosure - - - **22**  
*See COMPANY. 5.*

— Winding-up petition—Leave to present—Judgment creditor - - - **520**  
*See COMPANY. 16.*



**COURTS (EMERGENCY POWERS) ACT, 1914,**  
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*See COMPANY, 16.*

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*See COMPANY, 5.*

**COURTS (EMERGENCY POWERS) RULES,**  
 1914, r. 4 - - - 22  
*See COMPANY, 5.*

**COVENANT**—Lease—Covenant not to assign or sub-let—Covenant running with land  
*See LANDLORD AND TENANT, 802*

— Lessor and lessee—Agreement for under-lease—Covenant not to assign without consent of lessor, “such consent not to be unreasonably or vexatiously withheld” — Breach — Covenant running with land—Assigns - - - 549  
*See LESSOR AND LESSEE.*

— Restraint of trade—Reasonable protection of covenantee—Severability of covenant  
*See RESTRAINT OF TRADE, 1. 292*

**CREDITOR**—Building society—Winding-up—Official receiver—Dividends overpaid—Payment by mistake of law—Refunding amount overpaid - - - 91  
*See BUILDING SOCIETY.*

— Company—Winding-up.  
*See under COMPANY.*

— Judgment creditor—Land in mortgage—Writ of elegit — Order appointing receiver—Right of judgment creditor  
*See JUDGMENT CREDITOR, 274*

**CUSTOMERS**—Restraint of trade—Master and servant — Agreement not to solicit customers or to advertise that the servant was “late with” the master—Reasonable restriction — Breach by partnership firm — Responsibility of partner—Determination of contract by payment of wages in lieu of notice—Wrongful dismissal — Repudiation of contract - - - 530  
*See RESTRAINT OF TRADE, 2.*

**DAMAGES**—Company—Prospectus—Misrepresentation — Directors — Liability — Uncorroborated statement of promoter  
*See COMPANY, 10. 557*

— Practice—Solicitor—Commencing action on behalf of infant — Next friend an infant—Setting aside writ — Costs of defendants — Personal liability of solicitor - - - 177  
*See SOLICITOR, 2.*

— Town moor—Freemen’s right to depasture cattle on moor—Stint tickets—Transferees of stint tickets—Temperance festival on moor — Roundabouts and shows—“Fair” — Injury to herbage—Injunction—Measure of damages 71  
*See TOWN MOOR.*

**DEBENTURE-HOLDERS AND DEBENTURES**—Company.  
*See under COMPANY.*

**DEBT**—Advancement — Hotchpot clause—Insufficient estate—Release of debt 853  
*See WILL, 1.*

**DEED**—Will—Legacy — Ademption — Bequest for benefit of vicar of parish church—Bequest expressed to be in pursuance of wishes of testator’s deceased wife—Subsequent gift by deed of land for same purpose—Recited to be in memory of testator’s wife—Parol evidence—Admissibility—Codicil confirming will  
*See WILL, 13. 172*

**DEFEASANCE**—Will—Trust for A. in fee simple with gift over in case of his death “unmarried” and without issue—Gift over without words of limitation—Extent of defeasance - - - 246  
*See WILL, 9.*

**DELEGATION** — Will—Appointment—Power—Maintenance of infants—Delegation of power—Invalidity - - - 155  
*See POWER OF APPOINTMENT.*

**DEPOSIT**—Company—Purchase of undertaking of vendor company—Deposit of fund in names of trustees—Return of capital to shareholders — Winding-up of purchasing company—Rights of creditors  
*See COMPANY, 6. 759*

— Industrial society—Life assurance—Payments on death of members—Policy on human life—Ultra vires - - - 721  
*See INSURANCE.*

**DIFFERENTIATION** — in charges — Electric supply—Power and lighting—Similar circumstances - - - 124  
*See ELECTRIC LIGHT.*

**DIRECTORS**—Company.  
*See under COMPANY*

**DISCOVERY**—Patent—Action for infringement — Defence — Plea of manufacture mainly outside United Kingdom—Discovery of documents - - - 823  
*See PATENT, 2.*

**DISENTAILING DEED**—Settled land—Will—“Settlement” — Execution of disentailing deed by tenant in tail—Resettlement of part of settled land—Powers of tenant for life—Compound settlement - - - 9  
*See SETTLED LAND, 3.*

**DISMISSAL**—Wrongful dismissal—Master and servant—Repudiation of contract 530  
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**DISTRIBUTION**—Company—Assets.  
*See under COMPANY.*

**DISTURBANCE**—Market — Statutory market  
*See MARKET. 360*



**DIVIDENDS**—Building society—Winding-up—  
Official receiver—Creditors—Dividends  
overpaid—Payment by mistake of law—  
Refunding amount overpaid — 91  
*See BUILDING SOCIETY.*

— Company.  
*See under COMPANY.*

**DOCUMENTS**—Discovery of.  
*See under DISCOVERY.*

**DOMICIL**—Matrimonial domicil.  
*See under MARRIAGE.*

— Will—Personal estate—Law of Holland  
restricting testamentary capacity—  
Subsequent acquisition of English  
domicil giving enlarged testamentary  
capacity—Effect on former will — 572  
*See CONFLICT OF LAWS. 2.*

**DONATIO MORTIS CAUSA**—Bonds to Bearer—  
Box at Bank—Delivery of Key to Donee—  
Validity.

An inchoate or imperfect delivery of chattels  
may be sufficient for effectuating a donatio  
mortis causa. There is no distinction for this  
purpose between chattels and choses in action.

Testator, who was about to undergo a serious  
operation, was possessed of certain bonds to  
bearer in the custody of his bank which he was  
desirous to give to his wife in the event of his  
death. He visited his bank and put the bonds  
in a sealed parcel. He discussed the matter  
with the assistant manager, to whom he ulti-  
mately expressed his intention of putting his  
wife's name on the outside of the parcel and  
locking it up in his locked box, so that when his  
executors opened it they would hand over the  
parcel to her. This he did in the presence of  
his wife, who had followed him to the bank, and  
left the locked box with the bank, still, however,  
retaining the key, which he showed to his wife  
in order that she might recognize it, and he also  
gave her a list of the bonds and told her to keep  
it safely. They left the bank together, and  
when they reached their home the testator gave  
to his wife the bunch of keys containing the key  
of the locked box, and told her to lock them up  
with the list of the bonds. Accordingly she,  
under his direction, locked both the list and the  
bunch of keys in a drawer in her own room, of  
which she had and always kept the key. The  
same day the testator went to a nursing home,  
where he shortly afterwards died :—

*Held*, that the delivery of the key trans-  
ferring to the wife a partial dominion over, or  
part of the means of getting at, the bonds,  
though not a sufficient delivery to support a  
gift inter vivos, was, under the circumstances,  
a sufficient delivery to effectuate a donatio  
mortis causa. *In re WASSERBERG. UNION*  
*OF LONDON AND SMITHS BANK, LIMITED v.*  
*WASSERBERG* — — — *Sargant J. 195*

**DRAIN.**  
*See under SEWER.*

**DUTY**—Inland Revenue.  
*See under REVENUE.*

**ELECTION** — *Foreign Will* — *Devise of Real*  
*Estate in England* — *Defective Execution* —  
*Invalidity* — *Devolution* — *Residuary Legatee*  
*Heir.*

Where by a foreign will, not so executed as  
to pass real estate in England, real estate in  
England is devised away from the heir and  
personal estate is bequeathed to the heir, the  
heir is not bound to elect between the real and  
personal estates, but takes both.

*Hearle v. Greenbank* (1749) 3 Atk. 695, 715,  
applied.

A testatrix resident and domiciled in Italy  
in 1899 made an Italian will purporting to give  
real estate in England to V. absolutely, and her  
residuary real and personal estate to R. The  
will was not so executed as to be effectual to  
pass real estate in England. R. was the  
testatrix's heir-at-law. In 1901 the testatrix by  
deed settled the English real estate upon trust  
for V. for life with remainder for his children in  
tail, and an ultimate remainder to the use of her-  
self in fee. V. died, not having had children :—

*Held*, that R. was entitled to both the  
English realty as heiress-at-law and the  
personalty as residuary legatee, and was not put  
to her election between the two. *In re DE*  
*VIRTE. VAIANI v. RUGLIONI DE VIRTE*

*Joyce J. 920*

2. — *Restraint on Anticipation*—*Compensation*—*Spinster.*

The doctrine of election applies in the case of  
a spinster to whom an interest with a restraint  
on anticipation during coverture is given by the  
same instrument as that which gives rise to the  
question of election.

*Haynes v. Foster* [1901] 1 Ch. 361 distin-  
guished. *In re TONGUE. In re BURTON.*  
*HIGGINSON v. BURTON* — *Warrington J. 390*

*See next case.*

3. — *Restraint on Anticipation*—*Contrary*  
*Intention*—*Spinster.*

A testator gave a share of his residuary  
estate in trust for a spinster for life, coupled with  
a restraint on anticipation which was not in  
terms confined to coverture. He also disposed  
of other property which, as it happened, belonged  
to the spinster :—

*Held* that, notwithstanding the attempted  
restraint on anticipation, the spinster was put to  
election.

*In re Wheatley* (1884) 27 Ch. D. 606 ;  
*Hamilton v. Hamilton* [1892] 1 Ch. 396 ; and  
*In re Tongue* [1915] 1 Ch. 390 followed.

*In re Vardon's Trusts* (1885) 31 Ch. D. 275  
explained.

*Haynes v. Foster* [1901] 1 Ch. 361 not  
followed. *In re HARGROVE. HARGROVE v.*  
*PAIN* — — — *Astbury J. 398*

*See preceding case.*

4. — *Will*—*Administration*—*Husband and*  
*Wife*—*Mortgage of Property belonging to Wife*  
— *Election of Wife to take under Will*—*Liability*  
*of Property brought in by Election for Debts*—  
*Incidence of Contribution as between Bene-*  
*ficiaries*—*Real Estate Charges Act, 1854* (17 &  
18 Vict. c. 113), s. 1.

A testator, whose estate consisted chiefly of

**ELECTION**—*continued.*

five leasehold properties, appointed his wife and C. executors and trustees and gave all his estate to them upon trust to pay to his wife the rents for life, and after her death he left his four leasehold messuages in Q. Street and his six leaseholds in J. Street to his trustees upon trust to pay the income to his daughter, E. S., for life, and after her death to her children; and after the death of his wife he bequeathed two leaseholds in R. Street and a leasehold villa, B., to a niece, and after disposing of the remaining leaseholds in S. Street for the benefit of E. S. and her children, he bequeathed the residue of his estate to his wife, charged with debts. The property in Q. Street was subject to a mortgage for 318*l*. The property in J. Street was assigned to the testator's wife in 1888, and by a deed of August 25, 1909, the testator purported to mortgage it to secure 400*l*. This mortgage was existing at his death. The leasehold villa B. was assigned to the testator and his wife jointly in 1905, and by a deed of August 15, 1905, they jointly mortgaged the same to secure 400*l*. The other leaseholds in R. and S. Streets were also assigned to the testator's wife in 1888. The widow elected to take under the testator's will.

On an originating summons by C. to have it determined how, as between the beneficiaries, the two mortgages for 400*l*. respectively and the debts should be borne:—

*Held*, that the equities had to be determined as at the testator's death, and as to the mortgage of 400*l*. on the J. Street property, created without the knowledge of the wife, Locke King's Act did not apply, and this property was not primarily liable for the payment of this mortgage debt. But *held* as to the villa B., mortgaged by a deed to which the wife was a party, that Locke King's Act applied, and the property was primarily liable for the charge upon it.

*Held*, further, that, the residue of the testator's estate being now insufficient for the payment of debts, the property brought in by reason of the widow's election was liable to contribute *pari passu* with the testator's property in discharging his debts.

*Cooper v. Cooper* (1874) L. R. 7 H. L. 53, 69, applied. *In re WILLIAMS. CUNLIFFE v. WILLIAMS* — — — — **Eve J. 450**

**ELECTRIC LIGHT**—*Local Authority—Electric Supply—Power and Lighting—Similar Circumstances—Differentiation in Charges—Undue Preference—Electric Lighting Act, 1882* (45 & 46 Vict. c. 56), ss. 19, 20.

The Electric Lighting Act, 1882, provides by s. 19, "Where a supply of electricity is provided in any part of an area for private purposes, then except in so far as is otherwise provided by the terms of the licence, order, or special Act authorising such supply, every company or person within that part of the area shall, on application, be entitled to a supply on the same terms on which any other company or person in such part of the area is entitled under similar circumstances to a corresponding supply"; and by s. 20, "The undertakers shall not, in making any agreements for a supply of electricity, show any undue preference to any local authority,

**ELECTRIC LIGHT**—*continued.*

company, or person, but, save as aforesaid, they may make such charges for the supply of electricity, as may be agreed upon, not exceeding the limits of price imposed by or in pursuance of the licence, order, or special Act authorising them to supply electricity."

The defendants, who were the undertakers under the Long Eaton Electric Lighting Order, 1900, and with and under the powers and obligations imposed by that Order and the Electric Lighting Act, 1882, issued a circular with reference to the price proposed to be charged for electricity to power consumers, the effect of which was in certain cases to make a lower charge for power purposes to consumers who in addition to a supply for power took from the defendants exclusively a supply of electricity for lighting purposes, and a higher charge to consumers of electricity for power only or for power and partial lighting:—

*Held* by the Court of Appeal, affirming the decision of Sargant J. [1914] 2 Ch. 251, that the differentiation proposed by the circular was a breach of both ss. 19 and 20 of the Electric Lighting Act, 1882. **ATTORNEY-GENERAL v. LONG EATON URBAN DISTRICT COUNCIL—C. A. 124**

**ELEGIT, WRIT OF**—Judgment creditor—Land in mortgage—Order appointing receiver—Right of judgment creditor — **274**  
*See JUDGMENT CREDITOR.*

**EMPLOYER AND WORKMAN**—*Employer insured—Liability of Insurance Company—Continued Liability of Employer—Both Employer and Insurance Company in Liquidation—Right of Proof for Compensation—Workmen's Compensation Act, 1906* (6 Edw. 7, c. 58), s. 5, sub-ss. 1, 2, 3, 5.

The effect of s. 5 of the Workmen's Compensation Act, 1906, is that where an employer has entered into a contract with any insurers in respect of any liability under the Act, in the event of the employer becoming bankrupt, or, being a company, having commenced to be wound up, the claim of a workman for compensation is against the insurers only. He has no right to prove in the bankruptcy or liquidation of the employer except in the case provided for by sub-s. 2, which applies only when the insurance does not cover the whole of the employer's liability. *In re PETHICK, DIX & Co. BURROWS' CLAIM* — — — **Neville J. 26**

— Master and servant—Restraint of trade **530**  
*See MASTER AND SERVANT.*

**EQUITABLE EXECUTION.**

*See under EXECUTION.*

**ESTATE DUTY**—Revenue.

*See under REVENUE.*

**EVIDENCE** — Will — Construction — Charitable legacies—Jurisdiction of Court—Latent ambiguity—Evidence of intention **673**  
*See WILL. 5.*

**EVIDENCE**—*continued*.

— Will—Legacy—Ademption—Parol evidence  
— Admissibility — Codicil confirming  
will — — — — — 172  
*See WILL*. 13.

**EXECUTION**—Company—Winding-up petition  
— Leave to present—Judgment creditor  
— Equitable execution—Courts (Emergency Powers) — — — — 520  
*See COMPANY*. 16.

— Election—Foreign will—Devise of real estate in England—Defective execution  
— Invalidity — Devolution — Residuary legatee heir — — — — 920  
*See ELECTION*. 1.

**EXECUTOR**—Will—Construction—Residue to be at discretion of executor and at his own disposal—Absence of trust—Sole executor—Executor, whether entitled beneficially — — — — 241  
*See WILL*. 17.

**EXHIBITION** — Cinematograph—Projection of films on screen for inspection by intending purchasers or hirers — — 206  
*See CINEMATOGRAPH*.

**FENCE**—Highway—Nuisance—Quarry in land adjoining road—Collapse of fence and road—Duty of present occupier to restore—Remedy of local authority 235  
*See HIGHWAY*.

**FILMS**—Cinematograph — Exhibition — Projection of films on screen for inspection by intending purchasers or hirers — — 206  
*See CINEMATOGRAPH*.

**FINANCE ACTS.**

*See under REVENUE*.

**FIRE INSURANCE.**

*See under INSURANCE (FIRE)*.

**FORECLOSURE**—Company—Debenture-holder's action—Appointment of receiver and manager — — — — 22  
*See COMPANY*. 5.

**FOREIGN LANGUAGE**—Geographical name in — Trade mark — — — — 414  
*See TRADE MARK*. 2.

**FOREIGN SETTLEMENT** — Trustee — Public Trustee — Marriage contract — Scotch form — Matrimonial domicile — English husband and Scotch wife—Trustees, beneficiaries, and securities all English  
*See TRUSTEE*. 2. 228

**FOREIGN WILL**—Election—Devise of real estate in England—Defective execution  
— Invalidity — Devolution — Residuary legatee heir — — — — 920  
*See ELECTION*. 1.

**FRANCE**—Lunacy—Foreign lunatic not so found — Provisional administrator — Order of French Court—Securities in hands of English bailees—Refusal to deliver without order of English Court  
— Costs of action — — — — 696  
*See CONFLICT OF LAWS*. 1.

— Specific gift of chattels in France—"Free of legacy duty"—French mutation duty—Penalties for delay in payment—Incidence of duty and penalties — 592  
*See WILL*. 18.

**FRAUD**—Power of appointment—Limited power  
— Appointment by deed—Revocation—Avowed object of obtaining benefit—Fraud on power — — — — 373  
*See SETTLEMENT*. 2.

**FREEMEN**—Town moor—Freemen's right to depasture cattle on moor—Stint tickets  
— Transferees of stint tickets—Temperance festival on moor—Roundabouts and shows—"Fair"—Injury to herbage  
— Injunction—Measure of damages 71  
*See TOWN MOOR*.

**FRIENDLY SOCIETY**—*Registered Branch Lodge*  
— Breach of Rules—Money wrongfully divided between Members by Trustees of Lodge—Right of Trustees of Society to recover—Jurisdiction of Court—Dispute between Society and Members—Reference to General Meeting—*Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68*.

The rules of the O. Friendly Society provided that if any dispute should arise between the society and the board of directors and any district, lodge, or member such dispute should be referred to the following general meeting for settlement, except where otherwise provided by the rules. The rules further provided that no lodge should divide its funds or any part thereof without the sanction of the board of directors and a certificate of dissolution, and that any lodge acting contrary to this rule should forfeit the money so divided to the general fund of the society, to be recovered by legal process.

Sect. 68 of the Friendly Societies Act, 1896, enacts that every dispute between an officer of any registered branch of any society and the society or branch of which that registered branch is a branch "shall be decided in manner directed by the rules of the society or branch."

The defendants, who were the trustees, secretary, and treasurer of a lodge registered as a branch of the O. Friendly Society, wrongfully divided the funds of the lodge between the members thereof in breach of the rules. The trustees of the society brought an action to recover the funds from the defendants:—

*Held*, that the defendants were liable to be sued as trustees in whom property was vested by statute to be held upon certain trusts, and that the right of action against them was not taken away by s. 68 of the Friendly Societies Act, 1896.

*Seemle*, that, upon the construction of the rules also, the question in the action ought not to be referred to a general meeting of the society for settlement. *WINTER v. WILKINSON*



**GERMANY**—Trading with the enemy.  
See under **TRADING WITH THE ENEMY**.

**GIFT**—Will—Construction.  
See under **WILL**.

**GOODWILL** — Company — Debenture-holders' action—Appointment of receiver and manager—Onerous contract—Application for leave for manager to disregard — Goodwill of no value — - 682  
See **COMPANY**. 4.

— Trade mark—Registration—Special application—Vendor and purchaser of goodwill — Right to apply — Distinctive word—Geographical name in foreign language - - - - 414  
See **TRADE MARK**. 2.

**HIGHWAY**—Nuisance—Quarry in Land adjoining Road—Collapse of Fence and Road—Duty of Present Occupier to restore—Remedy of Local Authority—Quarry (Fencing) Act, 1887 (50 & 51 *Vict. c. 19*), s. 3.

Defendant owned and occupied land, being a worked-out quarry, immediately adjoining a public highway vested in an urban district council and repairable by the inhabitants at large. A prior owner of the land had, in 1865, made the excavation in order to quarry for limestone, and until then the surfaces of the road and the land had been on the same level. The excavation being a source of danger and obstruction to persons using the road, the excavator, to protect them and the road, built alongside the road a wall, the bottom of which rested on a ledge of limestone left ungoten for the purpose and served as a retaining wall for the subsoil of the road and as a fence wall above its surface. In February, 1913, part of the wall collapsed and fell into the quarry, and in consequence a considerable part of the subsoil of the road and of its surface fell in also, the road thus becoming impassable, a source of danger to persons attempting to use it, and a nuisance, liable under s. 3 of the Quarry (Fencing) Act, 1887, to be dealt with summarily under the Public Health Act, 1875:—

*Held*, (1.) that there was also a common law obligation on the possessor of the excavation to keep it fenced off whether it was made before or after his possession began, and whether he was or was not liable to his landlord, if any; and (2.) that, in an action by the Attorney-General at the relation of the council, a mandatory order must be made on defendant to abate the nuisance by restoring the road to its condition prior to the subsidence and by rebuilding the wall or providing some other reasonable fence between the road and the quarry.

*Greenwell v. Low Beechburn Coal Co.* [1897] 2 Q. B. 165 distinguished. **ATTORNEY-GENERAL v. ROE** - - - - - **Sargant J. 235**

— Sewer — Single private drain — Several houses belonging to one owner — Kingston-upon-Hull Corporation - 456  
See **SEWER**.

**HOLLAND**—Will—Personal estate—Law of Holland restricting testamentary capacity — Subsequent acquisition of English domicile giving enlarged testamentary capacity—Effect on former will - 572  
See **CONFLICT OF LAWS**. 2.

**HOTCHPOT CLAUSE** — Advancement — Insufficient estate—Release of debt - 853  
See **WILL**. 1.

— Will—Construction—Moneys covenanted to be paid in certain events to be brought in "in default of any direction to the contrary in writing" - 422  
See **WILL**. 10.

**HUSBAND AND WIFE** — Election — Will — Administration—Mortgage of property belonging to wife—Election of wife to take under will—Liability of property brought in by election for debts—Incidence of contribution as between beneficiaries - - - - 450  
See **ELECTION**. 4.

— Settlement—Husband's life policies—Wife first life tenant—Premiums paid by wife — No request by trustees — Lien - - - - - 373  
See **SETTLEMENT**. 2.

**INCOME** — Will—Trust—Life interest—Provision against alienation—Income accruing but not received by trustees at date of alienation - - - - 46  
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**INCREMENT VALUE DUTY** — Revenue — Unworked minerals — Form 4 — Notice irregular - - - - - 703  
See **REVENUE**. 3.

— Settled estate—Reversion duty- - 29  
See **REVENUE**. 2.

**INCUMBRANCES**—Sale of incumbered land free from incumbrances—Discharge of land by payment into Court - 94  
See **VENDOR AND PURCHASER**. 2.

**INDEFINITE GIFT**—Will—Construction—Indefinite gift of net profits of commercial undertakings—Shares in limited company—Advances—Interest in partnership - - - - - 408  
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**INDUSTRIAL SOCIETY**—Life assurance—Payments on death of members—Policy on human life—Deposit—Ultra vires - 721  
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**INFANT**—Power of appointment—Will—Power — Maintenance of infants—Delegation of power—Invalidity - - - - 155  
See **POWER OF APPOINTMENT**.

— Solicitor commencing action on behalf of infant—Next friend an infant—Setting aside writ — Costs of defendants — Damages—Personal liability of solicitor — Practice - - - - - 177  
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**INFRINGEMENT**—Patent.

See under PATENT.

**INJUNCTION**—Lands Clauses Acts—Compulsory purchase—Special Act—Provision against interference with main structure of building—"Take or interfere with"—Destruction of access to church—London County Council (Tramways and Improvements) Act, 1913 - 1  
See LANDS CLAUSES ACTS.

— Town moor—Freemen's right to depasture cattle on moor—Stint tickets—Transferees of stint tickets—Temperance festival on moor—Roundabouts and shows—"Fair"—Injury to herbage—Measure of damages - - - 71  
See TOWN MOOR.

**INSURANCE**—Industrial Society—Life Assurance—Payments on Death of Members—Policy on Human Life—Deposit—Ultra vires—Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 1 (a); s. 2, sub-s. 1; s. 30 (a).

The plaintiff was a member of an industrial society, and had received from them a share book, a membership card, a purchase book (in all of which her name and address were given), and a copy of the rules of the society. By the rules as amended it was provided that the objects of the society should include power to carry on the business of insurance as provided in rule 14A. By rule 14A the committee of management were authorized to appropriate money (inter alia) "for providing a sum to be paid on the death of a member or the wife or husband of a member, such sum to be proportional to one year's average purchases of the member from the society during the three years immediately preceding death." The society advertised "free life assurance" as an inducement to persons to become members.

The plaintiff alleged that the society had paid large sums of money in respect of this life assurance, and that they were carrying on the business of life assurance within the meaning of the Assurance Companies Act, 1909, without having paid the deposit of 20,000*l.* required by s. 2, sub-s. 1, of that Act, and brought an action to restrain them from doing so:—

*Held* (dissentiente Phillimore L.J.) that the society had done nothing ultra vires; that there had been no carrying on of life assurance business within the meaning of the Act of 1909; policies must be in writing and no policy had been issued, no premium had been paid; there was no obligation on the society to appropriate any further sum to the insurance fund, and the arrangement might at any moment be terminated by a general meeting.

Decision of the Vice-Chancellor of the County Palatine of Lancaster reversed. HAMPTON v. TOXTETH CO-OPERATIVE PROVIDENT SOCIETY, LIMITED - - - C. A. 721

**INSURANCE COMPANY**—Employer and workman—Employer insured—Liability of insurance company—Continued liability of employer—Both employer and insurance company in liquidation—Right of proof for compensation - - - 26  
See EMPLOYER AND WORKMAN.

**INSURANCE (FIRE)**—Ship—Policy—Insurance company—Winding-up order—Subsequent fire—Total loss—Rights of assured - - - 578  
See INSURANCE (MARINE).

**INSURANCE (LIFE)**—Industrial society—Payments on death of members—Policy on human life—Deposit—Ultra vires 721  
See INSURANCE.

**INSURANCE (MARINE)**—Fire Insurance—Ship—Policy limited to "fire only, including general average and salvage charges resulting therefrom"—Insurance Company—Winding-up Order—Subsequent Fire—Total Loss—Rights of Assured—Marine Insurance Act, 1906 (6 Edw. 7, c. 41), ss. 1, 3, 65, 66—Assurance Companies Act, 1909 (9 Edw. 7, c. 49), ss. 1, 17, 28.

A policy insuring a ship while on the Great Lakes "against the risk of fire only, including general average and salvage charges resulting therefrom," was drawn in such a form that it was doubtful whether it was a marine policy limited to fire, or a fire policy with marine incidents contractually attached.

The ship was totally destroyed by fire a few days after the winding up of the insurance company:—

*Held*, on the construction of the policy, that it was a fire policy with marine incidents contractually attached, so that it was a fire policy within the Assurance Companies Act, 1909, and the shipowners could only prove for the unexpired portion of the premium.

*Semble*, a marine policy limited to the risk of fire only would be a fire policy within the Assurance Companies Act, 1909, even though it were also a marine policy within the Marine Insurance Act, 1906. *In re UNITED LONDON AND SCOTTISH INSURANCE COMPANY. NEWPORT NAVIGATION COMPANY'S CLAIM*

Astbury J. 578

**INTEREST**—Tenant for life—Remainderman—Payment of debts, legacies, and duties—Rate of interest—Interest on estate duties—Adjustment of accounts - 769  
See ADMINISTRATION. 2.

**INTERNATIONAL LAW**—Private international law.

See under CONFLICT OF LAWS.

**JUDGMENT CREDITOR**—Land in Mortgage—Writ of Elegit—Order appointing Receiver—Charge when operative—Payment of Rent in advance by Tenant—Right of Judgment Creditor—Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 13—Judgments Act, 1864 (27 & 28 Vict. c. 112), s. 1—Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), s. 5—Land Charges Act, 1900 (63 & 64 Vict. c. 26), s. 2.

Where land is subject to a mortgage and incapable of being delivered in execution under a writ of elegit, the registration by a judgment creditor of a writ of elegit is a registration of "a writ or order for the purpose of enforcing" the judgment within s. 2 of the Land Charges Act, 1900, and operates to create a charge on the land under s. 13 of the Judgments Act, 1838.

**JUDGMENT CREDITOR**—*continued.*

A judgment creditor issued and duly registered writs of *elegit* against the judgment debtor and subsequently obtained and duly registered an order appointing a receiver of the rents and profits of the judgment debtor's land which was subject to a mortgage and incapable of being delivered in execution under a writ of *elegit*. After the registration of the writs of *elegit* but before the appointment of the receiver the tenant of the land, having no notice of the judgment creditor's claim, paid rent in advance to the judgment debtor:—

*Held* (dissentiente Kennedy L.J. and reversing the decision of Sargant J. [1914] 2 Ch. 211), that the payment was not a good payment of rent as between the tenant and the judgment creditor. **LORD ASHBURTON v. NOCTON**

C. A. 274

— Company—Winding-up petition—Leave to present—Equitable execution—Courts (Emergency Powers) — — — 520  
See COMPANY. 16.

**JUDGMENTS ACT, 1864, s. 1** — — — 274  
See JUDGMENT CREDITOR.

**JURISDICTION**—Company.  
See under COMPANY.

— Will—Construction—Charitable legacies—Declaration that trustee shall decide any question of disputed identity—Jurisdiction of Court—Latent ambiguity—Evidence of intention — — — 673  
See WILL. 5.

**KEY**—Delivery of key to donee—Donatio mortis causa—Bonds to bearer—Box at bank—Validity — — — — 195  
See DONATIO MORTIS CAUSA.

**KINGSTON-UPON-HULL CORPORATION**—Sewer—Single private drain—Several houses belonging to one owner—Highway — — — — — 456  
See SEWER.

**LAND CHARGES ACT, 1900, s. 2** — — — 274  
See JUDGMENT CREDITOR.

**LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888, s. 5** — — — 274  
See JUDGMENT CREDITOR.

**LANDLORD AND TENANT**—*Lease—Covenant not to assign or sub-let—Covenant running with Land.*

By a lease made in 1899 H. and P. (therein called "the lessors") demised to X. and Y. (therein called "the lessees") certain lands for a term of over seventy years, and the lessees covenanted with the lessors (amongst other things) as follows: that "the lessees will not at any time during the said term assign or sublet the said demised premises or any part thereof" or use the same in certain prohibited ways. An interpretation clause provided that "the expression 'the lessors,' used herein, shall, where the context so

**LANDLORD AND TENANT**—*continued.*

admits, include, besides the said H. and P., their respective executors, administrators, and assigns, and the expression 'lessees,' used in these presents, shall, where the context so admits, include, besides the said X. and Y., their respective executors or administrators." In 1899 X. and Y., with the licence of their lessors, assigned the demised property to the S. company, which in 1915 wished to assign it to another company:—

*Held*, (1.) that, although "assigns" were not mentioned in the covenant, it was binding on the S. company, and that that company could not assign the demised property without the consent of the lessors; and (2.) that the fact that in the definition in the lease the word "lessees," as contrasted with the word "lessors," was not stated to include assigns did not show a sufficient indication of intention that the covenant should be personal only and not run with the land. *In re ROBERT STEPHENSON AND COMPANY, LIMITED. POOLE v. THE COMPANY* Sargant J. 802

— Agreement for underlease—Covenant not to assign without consent of lessor—Breach—Covenant running with land—Assigns — — — — — 549  
See LESSOR AND LESSEE.

**LANDS CLAUSES ACTS**—*Compulsory Purchase—Injunction—Special Act—Provision against Interference with Main Structure of Building—"Take or interfere with"—Destruction of Access to Church—London County Council (Tramways and Improvements) Act, 1913 (3 & 4 Geo. 5, c. cii.), s. 18.*

By s. 18 of the London County Council (Tramways and Improvements) Act, 1913, which incorporated the Lands Clauses Consolidation Act, 1845, the defendants were authorized to take the parts of the several properties shown on the deposited plans and scheduled to the Act, comprising (inter alia) "forecourt, walls, gates, and railings" of the East Hill Baptist Church, Wandsworth, which lay within the line marked "limits of deviation," or such part thereof as they might require, without being required or compellable to purchase any greater part or the whole of any such property, "provided that this section shall not entitle the council to take or interfere with the main structure of any house, building, or manufactory." On March 18, 1914, the defendants served notice to treat in respect of the lands scheduled to the Act.

It appeared that the defendants proposed to take practically the whole of the forecourt in front of the church, the entrance to which was through the forecourt by a flight of stone steps in the centre of the front of the building, and by two flights of steps at each front corner which gave access to galleries. The result would be that the roadway would be brought to within ten inches of the central flight of steps by which the church was entered, and, as East Hill itself was a steep incline, it would be impossible to enter the church or the school buildings in the rear of the church without effecting extensive alterations in the main structure. The trustees of the church were willing and able to sell the

**LANDS CLAUSES ACTS—continued.**

whole of the buildings. They served notice on the council requiring them "to purchase and take the whole of the said chapel or other building," and moved to restrain them from entering on the land in question or any part thereof and from taking proceedings to obtain possession thereof, or any further steps to assess the value thereof, until judgment or further order. By their writ they also asked for a declaration that the council were not entitled to acquire the property compulsorily without also taking the chapel building and other lands and appurtenances adjoining the same belonging to the plaintiffs:—

*Held*, affirming the decision of Joyce J., that the proposed operations of the council would interfere with the main structure of the building within the meaning of the proviso to s. 18 of the special Act, and that they were not entitled to take part only of the property. **GENDERS v. LONDON COUNTY COUNCIL** — — — **C. A. 1**

**LATENT AMBIGUITY.**

See **AMBIGUITY**.

**LEASE.**

See under **LANDLORD AND TENANT**.

**LEASEHOLD—Vendor and purchaser—Contract**

—Title—Settled legacies charged on freeholds and leaseholds—Sale of leasehold—Payment of purchase price to trustee of settled legacies—Release of property sold from charge—Doubtful title — — — — — **162**  
See **VENDOR AND PURCHASER. 1.**

**LEGACY—Will—Construction.**

See under **WILL**.

**LEGACY DUTY.**

See under **REVENUE**.

**LESSOR AND LESSEE—Agreement for Under-lease—Covenant not to assign without Consent of Lessor, "such consent not to be unreasonably or vexatiously withheld."—Breach—Covenant running with Land—Assigns.**

By an agreement of March 7, 1900, to grant an underlease of a house and garden, No. 45, M. S. Square, for twenty-one years, it was provided that the lease should contain covenants by the lessees not to carry on any business on the premises, or any part thereof, nor to assign or demise without the consent of the lessor, "such consent not to be unreasonably or vexatiously withheld," and a power of re-entry for breach of any of the covenants. The lessees assigned the premises comprised in this agreement to H., the predecessor of the defendant. H. never took up a lease. In 1913 the plaintiff became entitled to the residue of the term of ninety-nine years granted by the head lease of these premises in 1856, and in February, 1914, she discovered that a part of the garden of No. 45 had been walled off and built upon for the purpose of being used in connection with the adjoining premises, No. 44, where an hotel was carried on by the defendant S. Her solicitors complained of this and various other irregularities. H. having

**LESSOR AND LESSEE—continued.**

asked the plaintiff's leave to assign the residue of his lease to S., consent was refused on February 6, 1914, without any reason being given. On March 19, 1914, H., without having obtained the consent of the plaintiff, assigned No. 45 to S. for the residue of the term of twenty-one years. It was admitted that S. was a respectable and responsible person. In an action by the plaintiff claiming to recover possession from S.:—

*Held*, that the plaintiff succeeded in the action, as her consent to the assignment had not been unreasonably or vexatiously withheld.

*Held*, also, that H. was bound by the covenant not to assign without consent, inasmuch as such a covenant ran with the land, and bound the assigns, although not mentioned. **GOLDSTEIN v. SANDERS** — — — — — **Eve J. 549**

**LICENCE—Patent—Petition for compulsory licence** — — — — — **780**  
See **PATENT. 1.**

**LIEN—Motor Car—Agreement to keep in repair and supply Owner with Chauffeur and Materials—Receiver.**

The owner of a motor car had an agreement with a company under which the latter were for three years to maintain the car and its accessories, provide a driver who was to be the company's servant, and do the necessary repairs. The owner was to pay the company a fixed annual sum up to a limited mileage and at a rate for every mile beyond the limit. The car when in London was kept at the company's garage, and whether the owner was in London or elsewhere she took the car out when and how she liked. An amount having become due by the owner under the agreement, the company took possession of the car and claimed a lien on it for the amount due:—

*Held*, (1.) that inasmuch as what the company did to the car was not to improve it, but only to maintain it in its former condition, the company had no lien on the car; (2.) that even if the company had a lien, their lien would have been lost by the arrangement (acted on) under which the owner was entitled to take away the car as and when she pleased. **HATTON v. CAR MAINTENANCE COMPANY, LIMITED**

**Sargent J. 621**

— Settlement—Husband's life policies—Wife first life tenant—Premiums paid by wife—No request by trustees — — — **373**  
See **SETTLEMENT. 2.**

**LIFE INSURANCE.**

See under **INSURANCE (LIFE)**.

**LIFE INTEREST—Will—Trust—Provision against alienation—Income accruing but not received by trustees at date of alienation** — — — — — **46**  
See **WILL. 20.**

**LIGHT RAILWAYS.**

See under **RAILWAY**.



**LIMITATION**—Chattels—Legal limitations to life tenant and remainderman—Chattels lost or injured—Claim for compensation for remainderman—Trustee or bailee—Liability of estate of tenant for life  
See WILL. 8. 829

— Marriage settlement—Limitations too remote—Gift over of life interests to persons in esse - - - 810  
See PERPETUITY.

— Will—Gift over without words of limitation—Extent of defeasance - - 246  
See WILL. 9.

— Will—Legal devise—Strict settlement—Compensious form—Construction—Devise to "every son of mine and his issue male in succession, so that" &c.—First words treated as merely introductory to subsequent limitations 129  
See WILL. 14.

**LIQUIDATION**—Employer and workman—Employer insured—Liability of insurance company—Continued liability of employer—Both employer and insurance company in liquidation—Right of proof for compensation, - - - 26  
See EMPLOYER AND WORKMAN.

**LIQUIDATOR**—Company—Winding-up.  
See under COMPANY.

**LOCAL AUTHORITY**—Electric supply—Power and lighting—Similar circumstances—Differentiation in charges—Undue preference - - - 124  
See ELECTRIC LIGHT.

**LOCAL GOVERNMENT**—District Council—Public Right of Way—Obstructions—Removal by Private Individuals—Action by Landowners—Resolution of District Council to defend Action—District Council made Defendants—Defence conducted by District Council on behalf of Co-defendants, without themselves claiming or denying Public Right of Way—Failure of Defence—Liability of District Council to Costs—Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 26.

An action was brought by certain landowners against private individuals for removing obstructions to an alleged public right of way. The district council having passed and acted on a resolution to defend the action under the Local Government Act, 1894, s. 26, were themselves made defendants, and a declaration that there was no public right of way was asked against them. On an application by the district council to be struck out as defendants, the plaintiffs were allowed to amend by alleging that the district council threatened and intended to use the alleged public right of way by their servants or agents. The district council then put in a defence stating that they neither claimed nor denied that the public right of way claimed by their co-defendants in fact existed, and they denied any threat or intention to use it by their servants or agents, but, though really innocent

**LOCAL GOVERNMENT**—continued.

of any such threat or intention, they in fact conducted the whole defence on the main issue, namely, the existence of the public right of way, up to the trial, and failed to establish it :—

*Held*, that the plaintiffs were entitled to a declaration with costs against all the defendants, including the district council.

*Thornhill v. Weeks* (No. 2) [1913] 2 Ch. 464, 468, followed.

*Rea v. Norfolk County Council* [1901] 2 K. B. 268 and *Offin v. Rochford Rural Council* [1906] 1 Ch. 342 distinguished. **THORNHILL v. WEEKS** (No. 3) - - - **ASTBURY J. 106**

— Sewers.

See under SEWER.

**LONDON**—Lands Clauses Acts—Compulsory purchase—Injunction—Main structure of building—Access to church - 1  
See LANDS CLAUSES ACTS.

**LUNACY**—Foreign lunatic not so found—Order of French Court—Securities in hands of English bailees—Refusal to deliver without order of English Court—Costs of action - - - 696  
See CONFLICT OF LAWS. 1.

**MAINTENANCE**—Maintenance of infants—Power of appointment—Will—Power—Delegation of power—Invalidity - 155  
See POWER OF APPOINTMENT.

**MARKET**—Statutory Market—Disturbance—Exception in case of Sales "on any land or in any building belonging" to a Seller "or in his occupation"—Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 13.

By a private Act, passed in 1871, incorporating certain statutes, including the Markets and Fairs Clauses Act, 1847 (except where expressly varied by the private Act), the plaintiffs were incorporated, the limits of operation of the Act were defined, and the company were empowered to continue, establish, and maintain a market for the sale of certain animals. By s. 42 every person who should, on the days appointed for holding markets, within the limits of the Act sell or expose for sale at any place within those limits, "except on any land or in any building belonging to him or in his occupation," any animals, in respect of which tolls were by the Act authorized to be taken, should forfeit and pay to the company any sum not exceeding forty shillings, unless he should have paid the tolls authorized. By s. 13 of the Act of 1847, after the market place of a market under a special Act is opened for public use, every person other than a licensed hawkers who sells or exposes for sale in any place within the prescribed limits "except in his own dwelling-place or shop" any articles in respect of which tolls are by the special Act authorized to be taken in the market is for every offence liable to a penalty not exceeding forty shillings. The plaintiffs' markets were held on every alternate Wednesday,



**MARKET**—*continued.*

and sales took place there both by auctioneers and through private bargains by the frequenters of the market. The defendant acquired and occupied land within the limits of the private Act, on which he erected buildings which were used for animals in respect of which tolls were payable when sold in the plaintiffs' market, and for selling purposes. In one building there were a ring for showing the cattle and a rostrum, and in the open there were pens for the animals. On these premises the defendant held auction sales of animals every third Tuesday. The sales were attended by several persons who attended the plaintiffs' market, but there was no private bargaining among those who attended the sales:—

*Held*, (1.) that s. 13 of the Act of 1847 was so varied by s. 42 of the private Act (*a*) that the exemption under the former in respect of sales in a shop was extended to sales on any land or building belonging to or occupied by the seller of tollable animals, (*b*) that the prohibition applicable to every day was so limited as to apply to market days only, and (*c*) that the exemption as regarded sales on land or in a building so owned or occupied freed the seller not only on market days but on other days; (2.) that, although the plaintiffs would have been entitled to an injunction to restrain the defendant's proceedings as a disturbance if the plaintiffs' market had been an ordinary or charter one, and although the owners of a statutory market were in as favourable a position in this respect, apart from any contrary express or implied provision in the statute, the defendant's acts were only selling at a place within the exemption in s. 42 of the private Act; (3.) that that section and s. 13 of the Act of 1847 exempted not only from pecuniary penalties, but also from any general prohibition against the excepted acts which would otherwise be inferred from the creation of a statutory market, and, therefore, (4.) that the plaintiffs' claim for an injunction failed.

In the case of a new statutory franchise of market an intention may more readily be implied to negative or limit the rights of monopoly that would otherwise attach to the franchise than in the case where a statute continues an existing market.

*Elwes v. Payne* (1879) 12 Ch. D. 468 distinguished.

*Abergavenny Improvement Commissioners v. Straker* (1889) 42 Ch. D. 83 followed.

*Birmingham Corporation v. Foster* (1894) 70 L. T. 371 and *Haynes v. Ford* [1911] 2 Ch. 237 explained. **HAILSHAM CATTLE MARKET COMPANY v. TOLMAN** — **Sargant J.** 360

**MARRIAGE**—Marriage contract—Scotch form — Foreign settlement — Matrimonial domicile—English husband and Scotch wife—Trustees, beneficiaries, and securities all English — — — 228  
*See* TRUSTEE. 2.

**MARRIAGE SETTLEMENT.**

*See* under SETTLEMENT.

**MASTER AND SERVANT**—Restraint of trade— Agreement not to solicit customers or to advertise that the servant was "late with" the master—Reasonable restriction—Breach by partnership firm— Responsibility of partner—Determination of contract by payment of wages in lieu of notice—Wrongful dismissal— Repudiation of contract — — — 530  
*See* RESTRAINT OF TRADE. 2.

— Employer and workman—Workmen's compensation.  
*See* under EMPLOYER AND WORKMAN.

**MAXIM** — "Actio personalis moritur cum persona" — — — — 829  
*See* WILL. 5.

**MEETINGS**—Company—Shareholders—General meeting—Alteration of articles—Special resolution—Notice—Sufficiency — 503  
*See* COMPANY. 11.

— Friendly society—Dispute between society and members — Reference to general meeting — — — — 317  
*See* FRIENDLY SOCIETY.

**MEMORANDUM OF ASSOCIATION**—Company.  
*See* under COMPANY.

**MINERALS.**

*See* under MINES.

**MINES**—*Surface Owner—Right to Support—Conveyance of Land—Exception of Mines and Minerals—Liberty to Grantor to work and get all Minerals "in as full and ample a way as if these presents had not been executed"—Implied Right to let down Surface.*

By an indenture dated in 1829 G. being seised in fee of certain estates conveyed a portion of them, consisting of farm lands and houses, to H. By the terms of the deed all the mines and minerals under the lands conveyed were excepted from the conveyance, full and free liberty being reserved to G., his heirs and assigns, to enter upon the lands, to sink pits and shafts, and to exercise all other powers for working and getting the minerals "in as full and ample a way and manner as if these presents had not been made and executed." G. also covenanted to pay compensation for damage or injury done by digging and sinking pits and shafts or otherwise in exercise of the powers reserved to him. In an action by the plaintiffs, deriving title through H., for an injunction to restrain the defendants, claiming through G., from so working the minerals as to let down the surface:—

*Held*, that having regard to the terms of the reservation, which gave the grantor full liberty to work and get the minerals in as full and ample a way as before conveyance, the plaintiffs' common law right to support was by necessary implication displaced, and the defendants had a right to let down the surface.

The rule laid down in *Love v. Bell* (1884) 9 App. Cas. 286, and *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.* [1906] A. C. 305, for the interpretation of similar words in Inclosure Acts has been explained as

**MINES**—*continued*.

resting upon the change in the nature of the commoners' interest effected by the inclosure. There is no ground for extending the principle to be found in these cases to the construction of deeds, where ordinary words ought to be given their plain and ordinary meaning.

Decision of Eve J. affirmed. *BEARD v. MOIRA COLLIERY COMPANY, LIMITED* - C. A. 257

See the report of *Chamber Colliery Company, Limited v. Twyerould* as a note at p. 268 to the above case.

— Revenue — Increment value duty — Unworked minerals — Form 4 — Notice irregular - - - - - 703  
See REVENUE. 3.

**MISREPRESENTATION** — Company — Prospectus—Directors—Liability - 557  
See COMPANY. 10.

**MISTAKE** — Building society — Winding-up — Official receiver—Creditors—Dividends overpaid—Payment by mistake of law—Refunding amount overpaid - 91  
See BUILDING SOCIETY.

**MOOR**—Town moor—Freemen's right to depasture cattle on moor—Stint tickets—Transferees of stint tickets—Temperance festival on moor—Roundabouts and shows—"Fair"—Injury to herbage—Injunction—Measure of damages 71  
See TOWN MOOR.

**MORTGAGE**—*Expectant Share as One of Next of Kin of living Person—Assignment of, by Way of Mortgage—Definite Item of Property—Bankruptcy and Discharge of Mortgagor before Falling into Possession of Share—Effect on Mortgage—Priority.*

In 1905 L., who as one of the next of kin of his mother was presumptively entitled to a share of her personal estate, assigned his expectant share to the N. Society by way of mortgage. In 1908 he assigned the same share to A. by way of mortgage subject to the mortgage of 1905. In 1908 he was adjudicated a bankrupt and in 1910 he received his discharge. Neither the N. Society nor A. proved in the bankruptcy. In 1911 L. assigned his expectant share to the I. Syndicate. In 1914 L.'s mother died, and the share thereupon fell into possession :—

*Held*, that the assignments of 1905 and 1908 operated so as to transfer the share on the death of the mother and did not merely impose a personal liability which could be affected by the bankruptcy.

*Held*, therefore, that the N. Society and A. were entitled in priority to the I. Syndicate.

*Collyer v. Isaacs* (1881) 19 Ch. D. 342 distinguished. *In re LIND. INDUSTRIALS FINANCE SYNDICATE, LIMITED v. LIND*

Warrington J. 744

— Company—Mortgages—Registration—Unregistered mortgage—Notice—Priority  
See COMPANY. 9. 643

**MORTGAGE**—*continued*.

— Mortgage of proceeds of sale—Registry Acts, Yorkshire—Land settled in trust for sale—Conversion—Registrability  
See REGISTRY ACTS. 214

**MOTOR CAR** — Lien—Agreement to keep in repair and supply owner with chauffeur and materials—Receiver - - - 621  
See LIEN.

**MUTATION DUTY (FRENCH)**—Will—Specific gift of chattels in France—"Free of legacy duty" - - - - - 592  
See WILL. 18.

**NAVIGATION COMPANY**—Light railway company—Statutory contract between railway and navigation companies—Right of Attorney-General to enforce contract on part of the public - 905  
See RAILWAY.

**NEWCASTLE-UPON-TYNE IMPROVEMENT ACT, 1870** - - - - - 71  
See TOWN MOOR.

**NOTICE**—Company—Mortgages—Registration—Unregistered mortgage—Notice—Priority - - - - - 643  
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— Company—Shareholders—General meeting—Alteration of articles—Special resolution—Notice—Sufficiency - 503  
See COMPANY. 11.

— Revenue—Duties on land values—Increment value duty—Unworked minerals—Form 4—Notice irregular - 703  
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**NUISANCE**—Highway—Quarry in land adjoining road—Collapse of fence and road—Duty of present occupier to restore—Remedy of local authority - - 235  
See HIGHWAY.

**OBSTRUCTIONS**—Public right of way—Removal by private individuals—Local government—District council—Action by landowners—Resolution of district council to defend action - - 106  
See LOCAL GOVERNMENT.

**OFFICIAL RECEIVER** — Building society—Winding-up—Creditors—Dividends overpaid—Payment by mistake of law—Refunding amount overpaid - 91  
See BUILDING SOCIETY.

**PAROL EVIDENCE.**  
See under EVIDENCE.

**PARTNERSHIP**—Restraint of trade—Master and servant—Customer—Reasonable restriction—Breach by partnership firm—Responsibility of partner - - 530  
See RESTRAINT OF TRADE. 2.

**PARTNERSHIP—continued.**

— Will—Construction—Indefinite gift of net profits of commercial undertakings—  
Shares in limited company—Advances  
—Interest in partnership — — 408  
See WILL. 11.

**PATENT—Petition for Compulsory Licence—  
Patents and Designs Act, 1907 (7 Edw. 7, c. 29),  
s. 24.**

The object of s. 24 of the Patents and Designs Act, 1907, relating to the grant of a compulsory licence is to meet failure on the part of the patentee to satisfy the reasonable requirements of the public as distinct from those of particular individuals.

Mere default in supplying the patented article or granting a licence to an individual does not necessarily amount to default in supplying the patented article or granting licences within the meaning of sub-s. 5 (a) of the section.

The expression "trade or industry" in sub-s. 5 (a) is to be read in a wide sense, as one speaks of the cotton or woollen trade or industry, so that it is not enough to establish that a particular trader is unfairly prejudiced; it must be further proved that the trade or industry as a whole is thus affected.

The "establishment of any new trade or industry" referred to in sub-s. 5 (a) is a different thing from the entry of a particular person into an existing trade or industry.

The "demand" referred to in sub-s. 5 (a) is not the demand of a particular person, but that of the public at large.

If the default towards the public is established, s. 24 confers two alternative rights: first, a right in the individual who presents the petition to have a licence granted to himself; and, secondly, a right, in the public, in the circumstances mentioned in sub-s. 3, to be relieved from the effects of the patentee's monopoly by the revocation of the patent.

An order under s. 24 should not take the form of a general direction to grant licences, but should direct the grant of a licence to the petitioner. Another person requiring a licence would have to present a petition of his own.

A patentee may use the advantage given by his patent either by putting it in operation himself and supplying the public with the article or by licensing others to do so. If he himself maintains an adequate supply there is no necessity from the public point of view for a grant of licences, and sub-s. 5 of s. 24 contemplates these alternatives as legitimate modes of working a patent. It is not enough, therefore, for a petitioner to prove that the patentee makes default in one of these alternative modes; he must prove that the patentee has made default in the other also.

The petitioners were the proprietors of a patent in 1911 for an improvement in incandescent electric lamps with two filaments and therefore alleged to have greater durability than the ordinary type of lamp with one filament only, and to make their invention a commercial success desired to use drawn tungsten wire. The two respondents were the respective owners of

**PATENT—continued.**

several patents relating to incandescent electric lamps with drawn tungsten wire filaments, the manufacture of such wire being covered by the patents, and had granted to each other and to other persons licences thereunder, and thus, through themselves and their licensees controlled the industry to a large extent. To prevent the cutting of prices the respondents required from their licensees an undertaking not to sell their lamps below certain list prices, the result being that the price in this country was considerably higher than abroad, but not so high as in the opinion of the Court to be unreasonable, while the supply of lamps was adequate to meet the demands of the public. The petitioners or their predecessors in title had requested one of the respondents to quote a price for the making for the petitioners of their double filament lamps, which the respondent consented to do, stipulating, however, that the lamps should not be sold at a price less than one shilling in excess of the respondents' price list. The petitioners declined this offer and applied to both the respondents to supply them with the wire made under the patents relating thereto, which both the respondents declined to do. The petitioners then inquired on what terms each of the respondents would grant a licence to manufacture the wire. Neither of the respondents complied with this request, though one of them offered to sell the wire at a price which the petitioners regarded as excessive. This petition for the grant of a compulsory licence was then presented. There was no trade or industry with which the wire was connected except the making and selling of electric lamps, and there was no demand for the wire except in that connection:—

*Held*, that the petitioners had failed to establish a case for the grant of a compulsory licence under s. 24. *In re ROBIN ELECTRIC LAMP COMPANY'S PETITION*

Warrington J. 780

2. — *Practice—Action for Infringement—Defence—Plea of Manufacture mainly outside United Kingdom—Discovery of Documents—Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 25, sub-s. 2 (b); s. 27—Rules of the Supreme Court, 1883, Order XXXI, r. 12.*

Where in an action for infringement of letters patent the defendant by his defence denies the validity of the patent and also pleads manufacture mainly outside the United Kingdom under s. 25, sub-s. 2 (b), of the Patents and Designs Act, 1907, and by his defence and particulars of objection clearly defines the issues:—

*Held* by Neville J., that the defendant was entitled, without proving a prima facie case, to the usual order for discovery of documents from the plaintiffs.

*Held* by the Court of Appeal, that as regards the plaintiffs' cause of action for infringement of the patent the order was rightly made, but that as regards the cause of action pleaded by the defendant under s. 25, sub-s. 2 (b), of the Patents and Designs Act, 1907, the discovery must be limited to documents showing the imports from persons named in the defence and documents



**PATENT**—*continued.*

showing the amount of manufacture by the plaintiffs. **BRITISH THOMSON-HOUSTON COMPANY, LIMITED v. DURAM, LIMITED — C. A. 823**

**PERPETUITY**—*Marriage Settlement — Limitations too remote—Gift over of Life Interests to Persons in esse.*

A gift over of life interests in personal property to persons in esse at the date of the settlement, if dependent on the failure of limitations that are too remote, is itself void for perpetuity.

*In re Thatcher's Trusts* (1859) 26 Beav. 365 followed.

*In re Norton* [1911] 2 Ch. 27 explained.

*In re HEWETT'S SETTLEMENT.* HEWETT v. ELDRIDGE — — — **Astbury J. 810**

— Rule against — Power of appointment amongst issue—Appointment of income for benefit of lunatic child—Contingent interest — — — — — **347**  
*See SETTLEMENT. 3.*

— Will — Charitable legacy — Tombstones, Repair of — Police "superannuation fund" — Police "pension fund" — **543**  
*See WILL. 7.*

— Will — Remoteness — Gift to husband of spinster for life with remainder to her children — — — — — **493**  
*See WILL. 15.*

**PERSONA DESIGNATA**—Will—Construction—Bequest of chattels—Wife for life **150**  
*See WILL. 3.*

**POLICE** — Charitable legacies — Perpetuities — Police "superannuation fund"—Police "pension fund"—"Police authority" **543**  
*See WILL. 7.*

**POLICY**—Insurance.  
*See under INSURANCE.*

— Insurance (Marine).  
*See under INSURANCE (MARINE).*

— Life policies—Settlement—Husband's life policies—Wife first life tenant—Premiums paid by wife—No request by trustees—Lien — — — — — **373**  
*See SETTLEMENT. 2.*

**POSTPONEMENT**—Settled land—Trust either to retain or sell—Subsequent power of postponement—Trust or power—Construction — — — — — **435**  
*See SETTLED LAND. 2.*

**POWER OF APPOINTMENT**—Will—Power—Maintenance of Infants—Delegation of Power—Invalidity.

By his will made in 1889 E. A. G. devised and bequeathed his residuary real and personal estate to trustees upon trust as to a particular share thereof to pay the income to his daughter for life, with power to her to appoint the income to her husband, and after her decease, and subject to any appointment to her husband, to hold the said share and the income in trust for

**POWER OF APPOINTMENT**—*continued.*

her children, or any of their issue in such manner as she should by deed or will appoint. The will contained an express provision enabling the trustees to apply any part of the annual income of the share to which an infant might be entitled towards the maintenance, education, or benefit of such infant, but by a codicil to his will the testator declared that the powers of maintenance should only apply to income to which the infant was, or if of full age would be, entitled. The daughter married and had three children, all infants, and respondents to the summons. By her will, made in 1908, after appointing a defeasible life interest in the settled share to her husband, she appointed the said share, and the income thereof, to all her children who should attain twenty-five before the expiration of twenty-one years from her death, or should be living at the expiration of such period without having attained twenty-five, with a proviso under which possible grandchildren might become entitled under the appointment to an interest in their parent's share, and she "empowered the trustees of the settled share" to apply the income of the expectant share of any child or grandchild for or towards his or her maintenance, education, or benefit. The testatrix and her husband having both died, upon a summons taken out by the trustees of the will of E. A. G. asking whether they had a discretionary power under either of the wills to apply the income of the shares to which the infant defendants were contingently entitled, for their maintenance, education, and benefit:—

*Held*, that the power contained in the appointment by the mother's will was an attempt to delegate to the trustees a personal direction exercisable by the donee, and therefore wholly inoperative.

*Held*, further, that the power under the grandfather's will was also inapplicable to this appointed share. *In re GREENSLADE.* GREENSLADE v. MCCOWEN — — — **Eve J. 155**

— Marriage settlement—Power of appointment amongst issue—Appointment of income for benefit of lunatic child—Rule against perpetuities—Contingent interest — — — — — **347**  
*See SETTLEMENT. 3.*

— Settlement—Limited power—Appointment by deed—Revocation—Avowed object of obtaining benefit—Fraud on power **373**  
*See SETTLEMENT. 2.*

— Trustee.  
*See under TRUSTEE.*

**PRACTICE** — Company — Winding-up — Committee of inspection—Appointment of solicitor — — — — — **192**  
*See COMPANY. 14.*

— Solicitor.  
*See under SOLICITOR.*

— Trading with the enemy—Parties to summons—Costs — — — — — **848**  
*See TRADING WITH THE ENEMY.*



- PREMIUMS** — Settlement — Husband's life policies—Wife first life tenant—Premiums paid by wife—No request by trustees—Lien — — — 373  
See SETTLEMENT. 2.
- PRIORITY** — Company — Mortgages—Registration—Unregistered mortgage—Notice  
See COMPANY. 9. 643
- Mortgage—Expectant share as one of next of kin of living person—Assignment of by way of mortgage—Bankruptcy and discharge of mortgagor before falling into possession of share — Effect on mortgage — — — 744  
See MORTGAGE.
- PROMOTER**—Company—Prospectus—Misrepresentation — Directors — Liability—Uncorroborated statements of promoter  
See COMPANY. 10. 557
- PROOF** — Employer and workman — Right of proof for compensation — Employer insured — Liability of insurance company—Continued liability of employer — Both employer and insurance company in liquidation — — — 26  
See EMPLOYER AND WORKMAN.
- PROSPECTUS** — Company—Misrepresentation—Directors — Liability — Uncorroborated statements of promoter — — — 557  
See COMPANY. 10.
- PUBLIC HEALTH**—Sewers.  
See under SEWER.
- PUBLIC TRUSTEE.**  
See under TRUSTEE.
- PURCHASER**—Vendor and purchaser.  
See under VENDOR AND PURCHASER.
- PURCHASERS OR HIRERS**—Cinematograph — Exhibition—Projection of films on screen for inspection by intending purchasers or hirers — — — 206  
See CINEMATOGRAPH.
- QUARRY**—Highway—Nuisance—Quarry in adjoining road—Collapse of fence and road—Duty of present occupier to restore—Remedy of local authority 235  
See HIGHWAY.
- QUARRY FENCING ACT, 1887, s. 3** — 235  
See HIGHWAY.
- RAILWAY**—*Light Railway Company—Construction of Local and Personal Act—Statutory Contract between Railway and Navigation Companies—Section commencing "For the protection of the Navigation Company"*—Clauses in Part for the Protection of the Public—Right of Contracting Parties to vary Contract—Right of Attorney-General to enforce Contract on Part of the Public.  
By a Light Railway Order of the Light Railway Commissioners, confirmed by the Board of
- RAILWAY**—*continued.*  
Trade under the Light Railways Act, 1896, a company incorporated by that Order was authorized to construct a light railway which was to be carried over a canal, then vested in a navigation company, by an opening or swing bridge.  
Sect. 29 of the Order commenced "For the protection of the Navigation Company the following provisions shall have effect"; then followed a number of sub-sections which provided, among other things, (3.) that the Light Railway Company should carry the railway over the canal by an opening or swing bridge at a defined height with opening space of a defined width; (4.) make provision for opening the bridge for the passage of barges, boats, or other vessels at all times by night and day; (5.) maintain the waterway at a certain depth; (8.) exhibit proper lights every night, and provide and work proper signals to inform and warn persons using the canal during foggy weather when the bridge was closed; and (16.) "The company and Navigation Company may agree for any variation or alteration of the works in this section provided for or of the manner in which the same shall be executed."  
The undertaking of the Light Railway Company was afterwards vested in the North Eastern and Lancashire and Yorkshire Railway Companies as part of their joint undertaking. The joint companies had agreed with the Navigation Company that the swing bridge should be altered into a fixed bridge. The Attorney-General brought this action, at the relation of the owner of a number of keels and boats using the canal, to restrain the companies from making the alteration:—  
*Held*, that as some of the provisions of s. 29 were clearly for the benefit of the public, the fact that it was stated to be inserted for the protection of the Navigation Company did not make it a mere contract between the companies which they could vary at pleasure, and the Attorney-General was entitled to bring the action for the protection of the public.  
*Held*, also, that the proposed alteration was not an alteration of works within the meaning of sub-s. 16, and the injunction must be granted.  
Decision of Astbury J. reversed. ATTORNEY-GENERAL v. NORTH EASTERN RAILWAY COMPANY — — — — — C. A. 905
- REAL ESTATE**—Will—Tenant for life—Trust of "as well the income as the corpus" in remainder to children who attain twenty-one or marry—Death of tenant for life leaving infants—Destination of rent till and after a child attained twenty-one — — — — — 429  
See WILL. 16.
- REAL ESTATE CHARGES ACT, 1854**—Election — Will—Administration — — — 450  
See ELECTION. 4.
- RECEIVER** — Company — Debenture - holder's action — Foreclosure—Appointment of receiver and manager — — — 22  
See COMPANY, 5.

**RECEIVER**—*continued.*

— Company—Debentures—Power for majority of registered debenture-holders to appoint a receiver — — — 478  
*See COMPANY. 7.*

— Company—Onerous contract—Application for leave for manager to disregard 682  
*See COMPANY. 4.*

— Judgment creditor, Right of—Land in mortgage—Writ of elegit—Order appointing receiver—Charge when operative—Payment of rent in advance by tenant — — — — 274  
*See JUDGMENT CREDITOR.*

— Motor car—Lien—Agreement to keep in repair and supply owner with chauffeur and materials — — — — 621  
*See LIEN.*

— Official receiver—Building society—Winding up — — — — 91  
*See BUILDING SOCIETY.*

**REGISTRATION**—Alien enemy—Right to sue as plaintiff—Residence in United Kingdom—Aliens Registration Act, 1914 — 58  
*See ALIEN ENEMY.*

— Company—Mortgages—Unregistered mortgage—Notice—Priority — — 643  
*See COMPANY. 9.*

— Trade mark — — — — 414  
*See TRADE MARK.*

**REGISTRY ACTS**—*Yorkshire—Land settled in Trust for Sale—Conversion—Mortgage of Proceeds of Sale—Registrability—Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), ss. 4, 14.*

A mortgage of an interest in the proceeds of sale under an imperative trust for sale of land in Yorkshire is not registrable under the Yorkshire Registries Act, 1884, and consequently the priorities of successive mortgages are determined by the dates of notices to the trustees.

*Principle of Arden v. Arden (1885) 29 Ch. D. 702 applied.*

By a settlement of September 9, 1885, freehold land in Yorkshire was conveyed to trustees upon trust to sell the same and hold the proceeds of sale upon trust for B. for life and after her death for C. absolutely. The settlement contained a power to postpone the sale, a trust in the meantime to hold the property upon such trusts as should correspond with the trusts thereinbefore declared concerning the trust funds, and a power to manage the real estate. The settlement was registered in Yorkshire:—

*Held*, that the trust for sale was imperative and effected an immediate conversion of the realty into personalty.

In 1892 C. borrowed money on mortgage of her reversion; the mortgagees gave notice of her mortgage to the trustees of the settlement, but did not register it under the Yorkshire Registries Act, 1884. In 1895 C. borrowed a further sum on the security of the land, which was still undisposed of. This mortgage and a

**REGISTRY ACTS**—*continued.*

transfer thereof to L. were registered at Wakefield:—

*Held* (affirming the decision of Astbury J. [1914] 2 Ch. 219), that mortgages of proceeds of sale under an imperative trust for sale did not require registration, and that the mortgage of 1892 had priority over that of 1895. *GRESHAM LIFE ASSURANCE SOCIETY v. CROWTHER*

C. A. 214

**RELEASE**—Advancement—Insufficient estate—Release of debt — — — — 853  
*See WILL. 1.*

**REMAINDERMAN.**

*See under SETTLED ESTATE and under SETTLED LAND.*

**REMOTENESS**—Perpetuity—Marriage settlement—Limitations too remote—Gift over of life interests to persons in esse  
*See PERPETUITY. 810*

— Will—Construction—Ultimate gift over after gifts void for remoteness—Alternative and independent gift—"Without leaving issue as before mentioned"—Meaning — — — — 837  
*See WILL. 21.*

— Will—Perpetuity—Gift to husband of spinster for life with remainder to her children — — — — 493  
*See WILL. 15.*

**RENT**—Judgment creditor, Right of—Payment of rent in advance by tenant — 274  
*See JUDGMENT CREDITOR.*

— Will—Real estate—Tenant for life—Trust of "as well the income as the corpus" in remainder to children who attain twenty-one or marry—Death of tenant for life leaving infants—Destination of rent till and after a child attained twenty-one — — — — 429  
*See WILL. 16.*

**REPUDIATION**—Contract—Restraint of trade—Master and servant—Customers—Breach by partnership firm—Responsibility of partner — — — 530  
*See RESTRAINT OF TRADE. 2.*

**RESIDUE**—Election—Foreign will—Devise of real estate in England—Defective execution—Invalidity—Devolution—Residuary legatee heir — — — 920  
*See ELECTION. 1.*

— Will—Construction—Residue to be at discretion of executor and at his own disposal—Absence of trust—Executor, whether entitled beneficially — 241  
*See WILL. 17.*

**RESTRAINT OF TRADE**—*Covenant—Reasonable Protection of Covenantee—Severability of Covenant.*

The plaintiff and the defendant each carried on a similar business as a dealer in imitation

**RESTRAINT OF TRADE—continued.**

jewellery, one in Old Bond Street, and the other in New Bond Street, London. The business consisted of the sale of imitation pearls or other jewels which were mounted in gold or platinum and sometimes set in small real diamonds. In order to avoid competition the defendant sold his business to the plaintiff and covenanted that he would not for the period of two years "either solely or jointly with or as agent or employee for any other person or persons or company directly or indirectly carry on or be engaged concerned or interested in or render services (gratuitously or otherwise) to the business of a vendor of or dealer in real or imitation jewellery in the county of London or any part of the United Kingdom of Great Britain and Ireland and the Isle of Man or in France, the United States, Russia, or Spain, or within twenty-five miles of Potsdamerstrasse, Berlin, or St. Stefans Kirche, Vienna."

The defendant having committed breaches of the covenant, in an action for an injunction:—

*Held* by the Court of Appeal, (1.), affirming the decision of Neville J. [1914] 2 Ch. 603, that the covenant was too wide in area unless severable; but that the covenant not to carry on business in the United Kingdom or the Isle of Man was severable from the rest, and was not wider than was reasonably necessary for the plaintiff's protection. (2.) Modifying the order of Neville J., that in so far as the covenant prevented the defendant from dealing in real or imitation jewellery it was unreasonably wide, but that in this respect also it was severable, and the defendant must be restrained from dealing in imitation jewellery. **GOLDSOLL v. GOLDMAN** C. A. 292

2. — *Master and Servant—Agreement not to solicit Customers, or to advertise that the Servant was "late with" the Master—Reasonable Restriction—Breach by Partnership Firm—Responsibility of Partner—Determination of Contract by Payment of Wages in Lieu of Notice—Wrongful Dismissal—Repudiation of Contract.*

K. and P. signed an agreement that K. should employ P. as saleswoman in his business at a fixed weekly salary, the employment to be terminable by a week's notice on either side and subject to conditions whereby P. agreed (1.) not at any time during or after the termination of the employment directly or indirectly to solicit, interfere with, or entice away from K. any customer of, or any person in the habit of dealing with, K.; and (2.) not at any time after the termination of the employment to advertise that she was "late with" or in the employment of K. K. discharged P., paying her a week's wages in lieu of notice. P. entered the employment of Ph., a former employee of K., who was carrying on in his own name a business similar to that of K., but had not entered into any covenant. It was alleged that P. was in fact in partnership with Ph. in his business.

K. brought this action against P. for an injunction restraining her from breaking her agreement. The breaches alleged were (1.) that she had personally signed and addressed to customers of K. circulars soliciting their custom

**RESTRAINT OF TRADE—continued.**

for Ph.; (2.) that the firm of Ph. had used in advertisements the words "Ph. (Russian) late with K.," in breach of clause 1 of the agreement.

The defendant took a preliminary objection that the dismissal of P. by K. on payment of wages in lieu of notice was a wrongful dismissal amounting to a repudiation of the contract by K.:—

*Held*, that there was no contract by K. to find employment for P. during the period for which she was paid wages, and therefore, there was no wrongful dismissal or repudiation of the contract.

*General Billposting Co. v. Atkinson* [1908] 1 Ch. 537; [1909] A. C. 118 distinguished.

*Held* on the facts, that the defendant was not proved to be a partner of Ph., and the words complained of did not represent that all the partners in Ph.'s firm were late with K.

*Held*, also, that the agreement not to solicit customers could not be confined by construction to persons who were customers during the employment, but extended to all persons who were customers at the date of the agreement or at any time after that date, and was therefore wider than was reasonable, and was bad. **KONSKI v. PEET** — — — — — **Neville J. 530**

**RESTRAINT ON ANTICIPATION—Election—**  
Compensation—Spinster — — **390**  
*See ELECTION. 2.*

— Election—Contrary intention—Spinster  
*See ELECTION. 3.* **398**

**RESULTING TRUST.**

*See under TRUST.*

**REVENUE—Estate Duty—Duty payable by Tenant in Tail who has not barred the Entail—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9, sub-s. 1, 6; s. 22, sub-s. 2 (a).**

A tenant in tail in possession who succeeds to land and has not barred the entail is "a person having a limited interest" in the property within the meaning of s. 9, sub-s. 6, of the Finance Act, 1894, and when he pays the estate duty on the principal value of the property passing on death to him he is entitled to a first charge for the amount on the property. *In re ANSON. BULLER v. ANSON* — **Sargant J. 52**

2. — *Increment Value Duty—Settled Estate—Reversion Duty—Payable out of Capital Moneys—Charge—Expenditure "reasonably incurred"—Accounts—Returns—Valuations—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21, sub-s. (a).—Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 11—Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), ss. 1, 2, 4, 13; s. 15, sub-s. 2; s. 25; s. 26, sub-ss. 1, 2; s. 39, sub-ss. 1, 4.*

Where a tenant for life of settled estates has made various sales and granted leases of parts of the settled estate, and incurred expenditure in the preparation of accounts, returns, and valuations necessary to enable the Commissioners to assess the increment value duty payable on sales



**REVENUE—continued.**

and the reversion duty payable on the determination of leases :—

*Held*, (1.) that increment value duty and reversion duty were properly payable out of capital moneys as between tenant for life and remainderman.

*In re Smith-Bosanquet's Settled Estates* (1912) 107 L. T. 191 followed.

Where no sufficient capital moneys were available for such payment the tenant for life, by the joint operation of s. 39 of the Finance (1909-10) Act, 1910, and s. 11 of the Settled Land Act, 1890, could charge the whole of the settled land with the increment value duty or the reversion duty payable in respect of any part of the settled land.

(2.) That the expenses incurred in the ascertaining and payment of duties, so far as these expenses arose in respect of a transaction involving the exercise of any of the statutory powers conferred upon the limited owner, were expenses incidental to the exercise of these powers within sub-s. (x.) of s. 21 of the Settled Land Act, 1882, and payable out of capital. Included in such cases would be the expenses incurred in respect of increment value duty, and of the reversion duty payable on the acceptance of a surrender of a lease; but in cases where reversion duty became payable on the determination of a lease by effluxion of time the expenses would not come within sub-s. (x.), and if the tenant for life desired to throw them upon the settled land he must exercise his statutory power of charging for that purpose.

*Held*, further, that s. 39 of the Finance (1909-10) Act, 1910, coupled with s. 11 of the Settled Land Act, 1890, enabled the limited owner to charge the settled estates with any expenditure reasonably incurred in connection with the original site valuation necessitated by the Finance Act, 1910, and also with the valuation under s. 15 of the Act necessary for ascertaining reversion duty. *In re MARYON-WILSON'S SETTLED ESTATES. MARYON-WILSON v. DU CANE* - - - - **Eve J. 29**

**3. — Land Values, Duties on—Valuation—Increment Value Duty—Unworked Minerals—Land in Occupation of Tenant—Minerals reserved to Owners of Land—Form 4—Notice irregular—Waiver—Return made by Owners as to Land—Omission in Return to specify Nature of Minerals and Estimate of their Capital Value—Right of Owners to make Separate Return as to Minerals—Substituted Capital Value—Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 23, sub-ss. 1, 2, 4; s. 26, sub-ss. 1, 2—Revenue Act, 1911 (1 Geo. 5, c. 2), s. 2.**

By s. 23, sub-s. 2, of the Finance (1909-10) Act, 1910, "For the purposes of valuation under this Part of this Act, all minerals shall be treated as a separate parcel of land; but, where the minerals are not comprised in a mining lease or being worked, they shall be treated as having no value as minerals, unless the proprietor of the minerals, in his return furnished to the Commissioners, specifies the nature of the minerals and his estimate of their capital value . . ." By s. 26, sub-s. 1, a valuation is to be made of

**REVENUE—continued.**

all land in the United Kingdom, and each piece of land which is under separate occupation is to be separately valued and the value is to be estimated as on April 30, 1909. By sub-s. 2 the owner of land, on being required by notice from the Commissioners, is to furnish to the Commissioners within thirty days a return containing such particulars as the Commissioners may require for the purpose of the valuation of the land.

The owners of a certain farm which was let to a tenant, the minerals being reserved to the owners, and not comprised in any lease nor being worked, received a notice to make a return accompanied by Form 4, on which the return was to be made. The copy of Form 4 supplied to the owners required them to furnish particulars of the house and land in the occupation of the tenant, and in the opinion of the Court of Appeal did not relate to the unworked minerals although it incidentally referred to them. The notice was invalid inasmuch as it did not give the owners the thirty days allowed by the Act within which to make the return. The owners, however, filled up the form, but in so doing left blank a space provided for the insertion therein of the nature of the minerals and the estimate of their capital value.

In an action by the owners against the Attorney-General for a declaration (1.) that they were not bound by the return so far as it related to the minerals, and (2.) that they were entitled to make a separate return as to the minerals :—

*Held* by the Court of Appeal, reversing the decision of Warrington J., that the copy of Form 4 served upon the owners was not a proper notice requiring a return of particulars respecting the minerals, and did not treat them as a separate parcel of land; that there had been no return with respect to the minerals within s. 23, sub-s. 2; and that the owners were entitled to make a return upon a proper form in pursuance of a proper notice, and to have a separate provisional valuation of the minerals treated as a separate parcel of land. When that had been done there was nothing to preclude them from having a substituted capital value of the minerals pursuant to s. 23, sub-ss. 1 and 4, and s. 2, sub-s. 3, as amended by s. 2 of the Revenue Act, 1911. **FORAN v. ATTORNEY-GENERAL C. A. 703**

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— Tenant for life—Remainderman—Payment of debts, legacies, and duties—Rate of interest—Interest on estate duty—Adjustment of accounts — — — 769  
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**SETTLED LAND**—*Life Estate—Assignment for Value—Settlement by Assignee's Will—Death of Assignee—Sale by Original Life Tenant—Persons qualified to Consent—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 50.*

The assignee for value of a life tenant's estate died, having devised that estate *pur autre vie* to trustees during the life of P., aged eleven, with legal remainders over in strict settlement.

The original life tenant or *cestui que vie* was aged forty, so that the legal remainders in the estate *pur autre vie* were very unlikely to come into possession.

The trustees who were in possession of the settled estates under this devise had full powers of management till P. attained twenty-five and for his whole life if he previously incumbered, but otherwise on attaining twenty-five he took a life interest with possession till he incumbered.

The original life tenant contracted to sell part of the settled estates under the powers preserved to him by s. 50 of the Settled Land Act, 1882:—

*Held*, that in the special circumstances the consent of the trustees was a sufficient consent within the section on behalf of the estate of the assignee for value. *In re MOUNTGARRET AND MOORE'S CONTRACT* — — *Astbury J. 443*

2. — *Trust either to retain or sell—Subsequent Power of Postponement—Trust or Power—Construction—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 63.*

A testator devised and bequeathed his real and personal estate to trustees upon trust “either” to retain it in the same state as at his death “or” at such times as the trustees thought fit to sell or convert it into money and to invest the proceeds in certain securities and to hold the trust estate in trust to pay the income to the plaintiff for life and subject thereto in trust for other beneficiaries.

The will contained a common form power of postponement, and the trusts were such as are ordinarily applicable to personal estate:—

*Held*, that the will created an immediate trust for sale with a mere power of postponement, which was a trust for sale within s. 63 of the Settled Land Act, 1882.

*In re Crips* (1906) 95 L. T. 865 and *In re Wagstaff's Settled Estates* [1909] 2 Ch. 201 followed.

*In re Hothkys* (1886) 32 Ch. D. 408; *In re Horne's Settled Estate* (1888) 39 Ch. D. 84; and *In re Goodall's Settlement* [1909] 1 Ch. 440

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3. — *Will settling Land and charging Annuities thereon* — “Settlement” — *Subsisting Annuities—Execution of Disentailing Deed by Tenant in Tail—Resettlement of Part of Settled Land—Powers of Tenant for Life—Compound Settlement—Settled Land Act, 1882* (45 & 46 Vict. c. 38), s. 2, sub-s. 1; s. 50, sub-s. 1; s. 58.

A disentailing deed executed by a tenant in tail in possession of settled land is not an “assignment, by operation of law or otherwise, of his estate or interest under the settlement” within the meaning of s. 50, sub-s. 1, of the Settled Land Act, 1882.

The words “stands for the time being limited to or in trust for any persons by way of succession” in s. 2, sub-s. 1, of the Act of 1882 include the case of annuities charged on the settled land followed by subsequent limitations although not secured by any term or trust.

E. W. T. by his will, dated in 1839, devised certain freehold estates to the use of his son E. S. T. for life and from and after the decease of E. S. T. to the use of his first and other sons successively, according to their respective seniorities, in tail male with remainders over, and he charged his settled estates with the payment of certain annuities, some of which were still subsisting. E. W. T. died in 1892. E. S. T., the tenant for life, died in 1912, and his eldest son, S. W. J. T., thereupon became tenant in tail in possession of the settled estates. On April 8, 1914, S. W. J. T. executed a disentailing deed, which was duly enrolled, limiting the settled estates to his own use in fee simple. On April 17, 1914, he executed a resettlement on his marriage of a part of the estates originally settled by the will to the use of himself for life with remainders over:—

*Held*, that S. W. J. T., having ceased to be tenant in tail of the estates not comprised in the resettlement, could no longer exercise the powers of a tenant for life in respect of them.

*Held*, also, as regarded the estates comprised in the resettlement, that by reason of the subsistence of the annuities there was a compound settlement consisting of the will, the disentailing deed, and the resettlement although there was no term limited to secure them nor any trust for their payment.

*In re Marquis of Ailesbury and Lord Iveagh* [1893] 2 Ch. 345 and *In re Phillimore's Estate* [1904] 2 Ch. 460 applied. *In re TRAFFORD'S SETTLED ESTATES* - - **Warrington J. 9**

— Costs — Equitable tenant for life and remainderman—Freehold ground rents — Repairing leases—Trustees’ “costs of management” — Costs of survey—Costs of serving notices to repair on lessees  
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— Revenue—Increment value duty—Reversion duty—Settled estates - - **29**  
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**SETTLEMENT**—*Equitable Tenant for Life and Remainderman—Freehold Ground Rents—Repairing Leases—Trustees’ “Costs of Management” —Costs of Survey—Costs of serving Notices to repair on Lessees.*

A testator who died in 1891 devised a freehold estate upon trust “to permit his wife to receive the rents, profits and income thereof during her life,” and after her death upon trusts for certain persons; and the testator empowered the trustees to “manage the said estate” until it should be sold and to pay “the costs of management” out of the rents and profits. The estate comprised 650 houses erected under long repairing leases granted to builders, and the ground rents amounted to 2100*l.* per annum. In 1913 the trustees incurred costs and expenses to upwards of 1100*l.* in having the estate surveyed and in having notices with schedule of repairs served on the tenants:—

*Held*, that the whole of these costs and expenses must be borne by the tenant for life.  
*In re TUBBS. DYKES v. TUBBS* **Neville J. 540**

2. — *Husband's Life Policies—Wife First Life Tenant—Premiums paid by Wife—No Request by Trustees—Lien—Power of Appointment—Limited Power—Appointment by Deed—Revocation—Avowed Object of obtaining Benefit—Fraud on Power.*

Policies on a husband's life were settled by a marriage settlement, the wife taking the first life interest. The husband covenanted to pay the premiums, but, owing to his want of means, the wife, in order to prevent the policies lapsing, paid the premiums voluntarily and without any request by the trustees. On the husband's death the trustees received the policy moneys:—

*Held*, that the wife was not entitled to a lien for the premiums.

*In re Leslie* (1883) 23 Ch. D. 552 applied.

Although the doctrine of fraud on a power does not apply to the release of a limited power, —*In re Somes* [1896] 1 Ch. 250—it applies to the revocation of an appointment thereunder. The donee cannot therefore revoke a previous appointment with the avowed object of obtaining a benefit by that revocation.

*Shirley v. Fisher* (1882) 47 L. T. 109 distinguished. *In re JONES' SETTLEMENT. STUNT v. JONES* - - - **Astbury J. 373**

3. — *Marriage Settlement—Power of Appointment amongst Issue—Appointment of Income for Benefit of Lunatic Child—Rule against Perpetuities—Contingent Interest.*

Under her marriage settlement a tenant for life had, in the events which happened, a power of appointment by will in favour of her five sons, one of whom was of unsound mind. By her will she appointed that after her death two fifths of the settled funds should be held in trust, until the lunatic should die or two medical men should certify him capable of managing his affairs, to apply the whole or so much of the income of the two fifths as should be required to make up the total income from all sources of the lunatic to 200*l.* per annum in such manner as the trustees should in their discretion think fit for the maintenance of the lunatic, and to divide the residue

**SETTLEMENT—continued.**

(if any) of such income equally between her other four sons; and then there followed gifts over. After the death of the tenant for life the question arose whether the trusts of the income of the two fifths infringed the rule against perpetuities:—

*Held*, that the trusts of the income of the two fifths for the benefit of the lunatic were void for remoteness, for the interest which the lunatic and his brothers took in such income was not vested, but contingent every year on the happening of events. *In re WHITEFORD. WHITEFORD v. WHITEFORD* — **Neville J. 347**

**4. — Real Estate—Trust for Sale—Conversion—General Power of Appointment over Proceeds—Exercise of Power by Will—Reconversion—Determination of Trust for Sale—Estate Duty—Incidence—“Property which does not pass to the executor as such.”—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9, sub-s. 1.**

Testatrix, in exercise of a general power of appointment over the proceeds of sale of real estate which was settled upon trust for sale, by her will appointed that the trustees of the settlement should stand possessed of the “hereditaments property money stocks funds and securities” which should be subject to the trusts of the settlement upon trust to “convey assign transfer and pay” the same to the trustees of the will upon trust for conversion with power to postpone conversion. The trust for sale under the settlement had not been exercised during the life of the testatrix:—

*Held*, that whether or not the testatrix had by her will indicated an intention that the property should go to her appointees as real estate, it was, in equity, at the time of her death personalty which, under the decision in *In re Hadley* [1909] 1 Ch. 20, passed to her executors “as such” within s. 9, sub-s. 1, of the Finance Act, 1894; and, therefore, that the estate duty in respect thereof was not charged upon the appointed property, but was payable out of the residuary estate.

Decision of *Eve J.* [1915] 1 Ch. 39 reversed.

*In re Lord Grimthorpe* [1908] 2 Ch. 675 distinguished. *In re O’GRADY’S SETTLEMENT. O’GRADY v. WILMOT* — — — **C. A. 613**

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*See SETTLED LAND. 3.*

**SEWER—Single Private Drain—Several Houses belonging to one Owner—Local Government—Highway—Public Health Act, 1875 (38 & 39**

**SEWER—continued.**

*Vict. c. 55), ss. 4, 13, 41—Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19—Kingston-upon-Hull Corporation Act, 1903 (3 Edw. 7, c. cccxvi.), s. 49.*

The Kingston-upon-Hull Corporation Act, 1903, s. 49, enacts by sub-s. 1 that “where two or more houses or premises are connected with a single private drain which conveys their drainage into a public sewer” the corporation shall have all the powers conferred by s. 41 of the Public Health Act, 1875; by sub-s. 2 that s. 19 of the Public Health Acts Amendment Act, 1890, shall cease to be in force within the city, and by sub-s. 3 that for the purposes of this section the expression “drain” includes a “drain used for the drainage of more than one building whether owned or occupied by the same person or not.” By the Public Health Act, 1875, s. 4, “drain” means “any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a . . . sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed”:—

*Held*, that the true meaning of s. 49 is that where the drainage pipe provided in common for a group of houses or properties is as exclusive and private in relation to those properties as the statutorily defined “drain” is in relation to the single house which it serves, then the liability of the owner or owners of those properties for nuisance arising from that common drainage is analogous to or corresponds with the liability of the owner of a single house for the statutory drain serving that house only.

The defendants were the owners of a roadway, being a cul-de-sac, having twenty cottages on one side and ten on the other and communicating with their back yards only. As the result of a notice under s. 23 of the Public Health Act, 1875, served on them in 1876, the defendants laid a conduit or 12-inch pipe under the whole length of the roadway, the greater part of which was outside the limit mentioned in s. 23 of 100 feet from the public sewer with which it communicated. This conduit was used only for surface water, including slops from the back yards of the cottages. The smaller conduits from the gullies in these back yards were 4-inch pipes, and met as a rule in pairs just within the curtilages of the cottages and were then carried by 6-inch conduits into the main conduit. As the result of another notice under s. 94 of the same Act, served on them in 1877, the defendants dealt with the surface water of the roadway by constructing seven gullies along the length of the roadway with 6-inch conduits leading into the main conduit. The land on which the roadway was built, the cottages on each side, and the land at the closed end had throughout been the property of the defendants. The plaintiffs, purporting to act under s. 49 of the Kingston-upon-Hull Corporation Act, 1903, and s. 41 of the Public Health Act, 1875, had recently required the defendants to abate a nuisance in respect of the drainage of the cottages and roadway, and having executed the necessary works themselves now claimed a declaration of charge upon the



**SEWER—continued.**

property for the costs of the work in connection with the main conduit.

The question was whether the main conduit was a "single private drain" within s. 49 of the Kingston-upon-Hull Corporation Act, 1903, and as incidental thereto two further questions were raised: (1.) whether the roadway had ever been dedicated to the public as a highway, and (2.) whether the conduit was vested in the plaintiffs or fell within the exceptions contained in s. 13 of the Public Health Act, 1875, as being made either for private profit or under the defendants' railway Acts:—

*Held*, that the roadway was a highway though not repairable by the public.

*Held*, also, that the case did not fall within the exceptions contained in s. 13 of the Public Health Act, 1875.

*Held*, also, that the conduit was notwithstanding a "single private drain" within s. 49, and that the plaintiffs were accordingly entitled to a declaration of charge upon the property for the cost of the work in connection therewith. **KINGSTON-UPON-HULL CORPORATION v. NORTH EASTERN RAILWAY COMPANY—Sargant J. 456**

**SHAREHOLDERS AND SHARES—Company.**

*See under COMPANY.*

**SHELLEY'S CASE—Rule in—Legal devise—**

Devise to "every son of mine and his issue male in succession, so that" &c.  
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**SOLICITOR—Costs—Taxation—Case for Counsel before Litigation—Perusing Particulars—Schedule of Documents on Change of Solicitors—"Other business"—Solicitor and Client—General Order, Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), r. 2, Sched. II.—Masters' Practice Notes—Rules of the Supreme Court, 1883, Appendix N, Nos. 55, 100.**

Drawing a case for counsel in contemplation of litigation comes within the expression "other business" in r. 2 of the General Order, Solicitors' Remuneration Act, 1881, and, being a "document" within Sched. II. thereto, is properly charged for at 2s. a folio. The allowance in that schedule is not confined to conveyancing business.

A solicitor whose retainer is withdrawn and who prepares a schedule of the documents to be handed over to the new solicitor, which is accepted by the latter, is entitled to charge for preparing the same.

Perusal of particulars delivered in an action under an order may be equivalent to perusal of an amendment of the pleadings and may be charged for as such. It is a matter in the discretion of the taxing Master. *In re R. P. MORGAN & Co. — — — Neville J. 182*

**2. — Infant, Commencing Action on behalf of—Next Friend an Infant—Setting aside Writ—Costs of Defendants—Damages—Personal Liability of Solicitor—Practice.**

Solicitor, having commenced action on behalf of an infant by her next friend who was also an infant:—

*Held*, personally liable, as between solicitor

**SOLICITOR—continued.**

and client, for costs which defendants had incurred in defending action, including costs of application to set aside writ, but excluding costs of defendants who had put forward the next friend. **FERNÉE v. GORLITZ — Eve J. 177**

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| 9 Edw. 7, c. 30, ss. 1, 7— <i>Cinematograph</i>                          | 206 |
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| 9 Edw. 7, c. 49, ss. 1, 17, 28— <i>Assurance Companies</i>               | 578 |
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- 10 Edw. 7, c. 8, ss. 1, 2, 4, 13; s. 15, sub-s. 2;  
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- s. 23, sub-ss. 1, 2, 4; s. 26, sub-ss. 1, 2  
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- 3 & 4 Geo. 5, c. cii., s. 18—*London County Council*  
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- 4 & 5 Geo. 5, c. 12—*Aliens Restriction* - 58  
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- 5 Geo. 5, c. 12, s. 3, sub-s. 1; s. 4, sub-s. 1—  
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- 4 & 5 Geo. 5, c. 78, s. 1, sub-s. 1 (a)—*Courts*  
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**TOWN MOOR**—*Freemen's Right to depasture Cattle on Moor—Stint Tickets—Transferees of Stint Tickets—Temperance Festival on Moor—Roundabouts and Shows—"Fair"—Injury to Herbage—Injunction—Measure of Damages—Town Moor Act, 1774 (14 Geo. 3, c. cv.), ss. 1, 3, 4—6, 7, 8, 10—Newcastle-upon-Tyne Improvement Act, 1870 (33 & 34 Vict. c. cxx.), ss. 6, 7, 8, 11, 12, 17, 19.*

By special Acts of 1774 and 1870 the right of resident freemen and widows of resident freemen of the town of Newcastle-upon-Tyne to depasture two milch cows each on the Town Moor was established and regulated, the number of cows to be depastured in any one year on the moor being limited to 800, and every freeman and widow of a freeman was entitled in April of each year on application to their stewards and wardens to a stint ticket for two milch cows to be depastured on the moor, which was transferable to any resident inhabitant of the town, but no person was to hold more than ten such tickets. In 1912 the area of the moor available for pasturage was insufficient to carry the statutory number of cows.

The Act of 1774 authorized the corporation at the request of the stewards and wardens from time to time to grant leases of parts of the Town Moor for the purpose of improving the same, but

**TOWN MOOR**—*continued.*

s. 7 enacted that no lease should be granted of that part of the Town Moor called the Cowhill and such part adjoining the same as should be necessary for holding the Cowhill fairs, nor of another part of the moor called the Race ground, nor of any part of the moor where any booths, stalls, and other erections had been set up during the holding of the said fairs or horse races, but the same should be preserved for fairs and horse races as theretofore. The Act of 1870 (s. 6) constituted a committee of the stewards and wardens to be elected annually, to act for the stewards and wardens and for the freemen and widows of freemen for all purposes relating to the Town Moor, and (s. 8) authorized the committee and the corporation from time to time to enter into agreements for the appropriation of parts of the Town Moor for not exceeding ten days at a time for agricultural shows or other public purposes.

Prior to 1882 horse races with attendant roundabouts and shows had for many years been held on the race ground on the Town Moor, but in that year they were and ever since had been held elsewhere. From 1882 down to 1912 a temperance festival with attendant roundabouts and shows was annually held on the old race ground on the moor with the joint consent of the committee and of the corporation, and had grown into a very large gathering of many thousands of people. In 1912 the heavy traction engines used by the defendants to bring their roundabouts and shows to the festival cut up the surface of the moor and seriously damaged the herbage: consequently, in 1913 the committee, while consenting to the festival being held as usual on the moor, declined to join with the corporation in granting a licence to the defendants to bring their roundabouts and shows on to the moor for the festival. The corporation nevertheless granted the defendants a licence for that purpose, and damage ensued to the herbage. Most of the holders of stint tickets for the years 1912 and 1913 were not freemen but persons who had purchased tickets from freemen. In an action by the committee against the defendants for an injunction to restrain them from bringing their roundabouts and shows on to the moor, and for damages, the corporation not being parties to the action:—

*Held* (affirming the decision of Neville J. [1914] 2 Ch. 293), that neither the horse races nor the temperance festival with the attendant roundabouts and shows was a fair within the meaning of s. 7 of the Act of 1774, and that the corporation had no power under either of the Acts to grant the licence to the defendants without the consent of the plaintiffs; and that the measure of damages was the amount of injury to the herbage, irrespective of whether the stint ticket holders were or were not freemen.  
WALKER v. MURPHY - - - C. A. 71

**TRADE**—*Restraint of.*

*See* under RESTRAINT OF TRADE.

**TRADE MARK**—*Application to register—Surname*—“Cadbury”—*Distinctive Word*—“Adapted to distinguish”—*Trade Marks Act,*

**TRADE MARK**—*continued.*

1905 (5 *Edw.* 7, c. 15), ss. 3, 9, 44—*Trade Marks Rules, 1906, rr. 39, 129.*

On an ex parte motion by Cadbury Brothers, Limited, to the Court, pursuant to r. 139 of the Trade Marks Rules, 1906, for an order on the Registrar of Trade Marks to proceed with their application under s. 9, sub-s. 5, of the Trade Marks Act, 1905, for the registration of the word “Cadbury” as their trade mark in respect of certain goods, the Court, being of opinion on the evidence that the word by long user in connection with the goods in question indicated and was distinctive of the goods manufactured by the applicants and by them only, and was adapted to distinguish such goods from those of any other person, ordered the application to be proceeded with. *In re CADBURY BROTHERS, LIMITED'S APPLICATION* - Neville J. 331

2. — *Registration—Special Application—Distinctive Word—Geographical Name in Foreign Language—Vendor and Purchaser of Goodwill—Right to apply—Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9, sub-s. 5; s. 22.*

The word “Berna,” though it is the name of the capital of Switzerland in the Italian and Spanish languages, is not incapable of registration under the Trade Marks Act, 1905, s. 9, sub-s. 5, in connection with the business of manufacturers of motor vehicles in the United Kingdom.

It is no objection to such an application that the goodwill of the original business, including the right to the use of the name, has become divided between three distinct sets of owners: (1.) in the United Kingdom, (2.) in British colonies, and (3.) in foreign countries.

As between vendor and purchaser of the goodwill of the business such an application should be made by the purchaser and not by the vendor on the purchaser's behalf. *In re BERNA COMMERCIAL MOTORS, LIMITED*

Sargant J. 414

**TRADE MARKS RULES, 1906, rr. 39, 129**

*See* TRADE MARK. 1.

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**TRADING WITH THE ENEMY**—*Practice—*

*Cheque drawn by German Bank on English Bank—Cheque dishonoured—Summons by Holders to vest in Custodian alleged Credit Balance in Hands of English Bank—Denial by English Bank of Existence of such Balance—Parties to Summons—Costs—Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12), s. 3, sub-s. 1; s. 4, sub-s. 1—Trading with the Enemy (Vesting and Application of Property) Rules, 1915, r. 2 (3.), (4.).*

Sec. 4, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914, which empowers the Court on the application of a creditor of an enemy to vest in the custodian any real or personal property belonging to the enemy, is directed against specific property which can be definitely pointed out and does not include an alleged credit balance on a running account between the enemy and a bank, the existence of which balance is denied by the bank.

A debtor to an alien enemy is not a “person



**TRADING WITH THE ENEMY—continued.**

who holds or manages for or on behalf of an enemy any property" within the meaning of s. 3, sub-s. 1, of the same Act and ought not therefore under r. 2 (4.) of the Trading with the Enemy (Vesting and Application of Property) Rules, 1915, to be named as a respondent to an originating summons for a vesting order under s. 4, unless, at any rate, it is clear that he admits the debt. *In re BANK FÜR HANDEL UND INDUSTRIE* - - - Warrington J. 848

**TRADING WITH THE ENEMY (VESTING AND APPLICATION OF PROPERTY) RULES, 1915, r. 2 (3.), (4.) - 848**  
 See TRADING WITH THE ENEMY.

**TRUST—Resulting Trust—Property settled by Father on his Daughter's Marriage—Subsequent Bequests by Father on the Trusts of the Settlement.**

By a settlement made in 1881 on the marriage of M., the daughter of B., to C., after reciting that C. and B. were respectively entitled to certain funds, and that B. had transferred from his own funds to the trustees a sum of 1670*l*. Consols to be held as part of "the trust estate hereby constituted," C. and M. respectively assigned their own funds to the trustees upon the trusts thereafter declared. The settlement then declared that the trustees should hold "all the trust estate hereby constituted" until the marriage upon trust for the persons to whom the same respectively then belonged; and after the marriage to pay the income of C.'s fund to him during the joint lives of C. and M.; and as to the 1670*l*. Consols and M.'s fund to pay the income to M. during the same joint lives; and after the death of either C. or M. to pay the income of "all the trust estate hereby constituted" to the survivor for life; and after the survivor's death upon trust as to corpus for the children of the marriage. In default of there being a child of the marriage, C.'s fund was to belong to him, and the 1670*l*. Consols and M.'s fund, if M. died in the lifetime of C., were to be held in trust for such persons as she should appoint, and in default of appointment to the persons who, if she had died intestate and unmarried, would have been entitled to her personalty under the Statutes of Distribution; but there was no declaration of trust as to these two funds in case of C. dying in the lifetime of M. and there being no child of the marriage. B., in the lifetime of C. and M., made a will whereby he declared that his trustees should stand possessed of one fourth of his residuary estate, "hereinafter referred to as M.'s share," upon trust to transfer the same to the trustees of her settlement, to be held by them upon the trusts by that settlement declared concerning "the fortune brought into settlement by or on behalf of M." C. died in the lifetime of M., and there was no child of their marriage. It was conceded that as regarded the fund which belonged to M. and was settled by her there was a resulting trust in her favour:—

*Held*, (1.) that as regarded the 1670*l*. Consols there was a resulting trust (subject to the life interest of M.) in favour of B., the father; but

**TRUST—continued.**

(2.) that the fourth share of his residue had been completely severed from B.'s estate and given to M.'s trustees for her benefit, and that there was an ultimate trust of this share in favour of M.

*In re Donnelly's Estate* [1913] 1 I. R. 177 followed as to (1.).

Principles of *Lassence v. Tierney* (1849) 1 Mac. & G. 551 applied as to (2.). *In re CONNELL'S SETTLEMENT. In re BENETT'S TRUSTS. FAIR v. CONNELL* - - - Sargant J. 867

— Charity—Will—Trust "for the protection and benefit of animals"—Validity 113  
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— Sale, Trust for—Real estate—Conversion—Reconversion—Estate duty—Incidence - - - 613  
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— Settled land—Trust either to retain or sell—Subsequent power of postponement—Trust or power—Construction - 435  
 See SETTLED LAND. 2.

— Trustee.  
 See under TRUSTEE.

**TRUST DEED**—Company—Debenture stock—Distribution of assets by trustees—Partly paid stock—Rights of holders  
 See COMPANY. 2. 472

**TRUST FOR CONVERSION**—Will—Tenant for life and remainderman—Trust for conversion—Power to postpone—Power to retain—"Stocks, funds, or securities"—Shares in Canadian land company—Wasting securities—Income in specie  
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**TRUST FOR SALE**—Land settled in trust for sale—Conversion—Mortgage of proceeds of sale—Registry Acts—Registrability - - - 214  
 See REGISTRY ACTS.

**TRUSTEE**—Power of appointing New Trustee—Exercise of Power—Fiduciary Power—Appointment of Solicitor of Donee of Power—Appointment after Court has made an Order relating to the Trust under Order LV.

Though the Court will not itself appoint a solicitor of one of the parties to be a new trustee, an appointment of his own solicitor by the donee of a power to appoint is not invalid, even when the appointment is made without notice to the cestui que trust, and the trustee appointed is objectionable to some of them. The rule that the donee of a power to appoint new trustees cannot exercise it after the Court has made an order for administration without the approval of the Court applies only when there is a general administration order. It does not apply to an order for partial administration under Order LV., unless an inquiry is ordered as to the appointment of new trustees, or the proceedings are taken for the purpose of having new trustees appointed.

*In re Earl of Stamford* [1896] 1 Ch. 288 followed.



**TRUSTEE**—*continued*.

*In re Hall* (1885) 33 W. R. 508 and *Attorney-General v. Clack* (1839) 1 Beav. 467 distinguished. *In re COTTER. JENNINGS v. NYE Astbury J. 307*

2. — *Public Trustee—Marriage Contract—Scotch Form—Foreign Settlement—Matrimonial Domicil—English Husband and Scotch Wife—Trustees, Beneficiaries, and Securities all English—Public Trustee Act, 1906* (6 Edw. 7, c. 55), s. 5; s. 17, sub-s. 2.

It is not competent to the Public Trustee to accept the trusteeship of any settlement other than an English one.

Where, therefore, the trustees of a marriage contract, which, when executed, was in form and substance a Scotch settlement, desired to appoint the Public Trustee to be sole trustee of the settlement, on the ground that the matrimonial domicil, the present trustees, the beneficiaries, and the trust investments were all English:—

*Held*, that the settlement still remained a Scotch settlement to be construed according to Scotch law, and there was no statutory power enabling the Public Trustee to accept the trusteeship of what was a foreign settlement. *In re HEWITT'S SETTLEMENT. HEWITT v. HEWITT* — — — — — **Eve J. 228**

— Banker—General account—Mixing of trust funds with private money—Charge on balance for trust — — — — — **62**  
*See BANKER.*

— Chattels lost or injured—Claim for compensation by remainderman—Trustee or bailee—Liability of estate of tenant for life — — — — — **829**  
*See WILL. 8.*

— Costs—Trustees' "costs of management"—Settlement—Equitable tenant for life and remainderman—Freehold ground rents—Repairing leases—Costs of survey—Costs of serving notices to repair on lessees — — — — — **540**  
*See SETTLEMENT. 1.*

— Will—Construction—Residue to be at discretion of executor and at his own disposal—Absence of trust—Executor, whether entitled beneficially — — — — — **241**  
*See WILL. 17.*

— Will—Trust—Life interest—Provision against alienation—Income accruing but not received by trustees at date of alienation — — — — — **46**  
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**ULTRA VIRES**—Industrial society—Life assurance—Payments on death of members—Policy on human life—Deposit — — — — — **721**  
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**UNDERLEASE**—Agreement for—Covenant not to assign without consent of lessor—Breach—Covenant running with the land—Assigns — — — — — **549**  
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**UNDUE PREFERENCE**—Local authority—Electric supply—Power and lighting—Similar circumstances—Differentiation in charges — — — — — **124**  
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**"UNMARRIED"**—Will—Construction — — — — — **246**  
*See WILL. 9.*

**VENDOR AND PURCHASER**—Contract—Title—Settled Legacies charged on Freeholds and Leaseholds—Sale of Leasehold—Payment of Purchase Price to Trustee of Settled Legacies—Release of Property sold from the Charge—Doubtful Title.

A trustee mortgagee has power to release part of his security on receipt of the whole of the purchase-money produced thereby.

Where, therefore, trust legacies were charged by will upon freehold and leasehold properties, and the persons entitled to the property subject to the charge, one of them being also the trustee of the legacies, agreed to sell to a purchaser a leasehold house and premises forming part of the estate on the terms that the whole purchase-money of this leasehold should be received by the trustee of the legacies:—

*Held*, that the vendors could make a good title to the leasehold house and premises freed and discharged from the trust legacies. *In re MORRELL AND CHAPMAN'S CONTRACT*

**Eve J. 162**

2. — *Sale of Incumbered Land free from Incumbrances—Discharge of Land by Payment into Court—Conveyancing and Law of Property Act, 1881* (44 & 45 Vict. c. 41), s. 5.

Where land subject to a capital charge, such as a term to secure portions, is sold free from incumbrances and without the assent of the incumbrancers, and an application is made to the Court, under s. 5 of the Conveyancing Act, 1881, for an order for payment into Court of an amount sufficient to meet the incumbrances and interest thereon and the additional amount to meet the contingencies referred to in the section, the amount to be paid in to meet the incumbrance is not necessarily merely the bare amount of the capital charge, but the Court may direct payment into Court of such amount as, when invested in Government securities, it considers will be sufficient to meet the capital charge and interest thereon.

The object of the section is not to disturb any rights more than is necessary, but to enable a sale to be carried through notwithstanding there is an incumbrance which, but for the section, would prevent a sale free from incumbrances. Although the purchaser gets the property unincumbered, the money paid into Court is not substituted, as between the incumbrancer and the vendor, for the incumbered land as the sole security for the incumbrancer's money. The incumbrancer has an additional security on the purchase-money received by the vendor, who, in case of a depreciation in value of the Government securities in which the money is invested, is bound to make good the depreciation to the incumbrancer, whereas any appreciation in value belongs to the vendor.

**VENDOR AND PURCHASER**—*continued.*

Important matters under the section should not be decided by a Master but referred to the judge. *In re WILBERFORCE'S TRUSTS*. WILBERFORCE v. WILBERFORCE - - - **Sargant J. 94**

— Purchase of undertaking of vendor company—Deposit of fund in names of trustees—Return of capital to shareholders—Winding up of purchasing company—Rights of creditors - **759**  
See COMPANY. 6.

— Trade mark—Registration—Special application—Distinctive word—Geographical name in foreign language—Vendor and purchaser of goodwill—Right to apply - - - **414**  
See TRADE MARK. 2.

**WAR**—Alien enemy.

See under ALIEN ENEMY.

— Courts (Emergency Powers).  
See under COURTS (EMERGENCY POWERS).

— Trading with the enemy.  
See under TRADING WITH THE ENEMY.

**WASTING SECURITIES**—Will—Trust for conversion—Power to postpone—"Stock, funds or securities"—Income in specie  
See WILL. 19. **187**

**WAY, RIGHT OF**—Public right of way—Local government—District council—Obstructions—Removal by private individuals - - - **106**  
See LOCAL GOVERNMENT.

**WILL** — *Advancement* — *Hotchpot Clause* — *Advances by Way of Loan* to be "taken in full or in part satisfaction" of Benefits given by Will — *Insufficient Estate*—*Release of Debt*.

A testator provided that all advances by way of loan to his son H. and all interest owing on any such advances should be "taken in full or in part satisfaction (as the case may be)" of the benefits given to H. under his will.

It being doubtful whether the legacies and share of residue given to the son would cover his total indebtedness:—

*Held*, that the son's personal liability was released and that the debts were merely to be brought into account as ordinary advances.

Observations of the Court of Appeal in *Limpus v. Arnold* (1884) 15 Q. B. D. 300 and *In re Cosier* [1897] 1 Ch. 325 followed.

*In re Schweder* [1893] W. N. 12; 37 Sol. J. 249, not followed. *In re TROLLOPE. GAME v. TROLLOPE* - - - **Astbury J. 853**

2. — *Bequest for Life*—*Remainder to Two Persons*—*Should one die before the other, Survivor to take the Whole*—*Reading in Contingency*—*Will*—*Construction*.

A testator left property in trust for A. for life, and at her death to go to his two nieces B. and C. in equal shares. "Should one of my nieces die before the other, the other surviving niece to take the whole. Should my nieces die

**WILL**—*continued.*

without lawful issue," the estate to be sold and divided amongst other persons. Testator died in 1857, the tenant for life in 1873, and B. (leaving children) in 1911:—

*Held*, that there must be read into the gift the contingency of a niece dying in the lifetime of the tenant for life, and that C. was only entitled to one half and the executors of B. to the other.

*Howard v. Howard* (1856) 21 Beav. 550 followed. *In re FISHER. ROBINSON v. EARDLEY* - - - **Sargant J. 302**

3. — *Bequests of Chattels*—*Wife for Life*—"Person who under this my will shall at her death become entitled to the possession" of Realty—*Persona designata*—*Will*—*Construction*.

Where a testator bequeathed chattels, after giving a life interest to his wife, to the person who under his will should at her death become entitled to the possession of a mansion which he devised to his wife for life with remainder to his first and other sons in tail male, and the wife and eldest son disentailed and resettled to such uses as they should appoint and in default to the original uses:—

*Held*, that the bequest of chattels after the death of the wife was an ordinary contingent gift to a person who should then answer a certain description, namely, who under the will shall have become entitled to the possession of the mansion; and that, during the life of the wife, it was impossible to say who that person would be, and the eldest son had not become absolutely entitled to them. *In re EARL OF CALEDON. ALMANDER v. EARL OF CALEDON*  
**Joyce J. 150**

4. — *Bequest of Income* to "each of such of" several Persons "as shall be living" at the death of a certain Person "during their respective lives" and "after their decease" in trust for other Persons—Person entitled to Share of Income of Original Legatees from Time to Time dying—*Will*—*Construction*.

A testator gave his trust estate to trustees "upon trust to pay the income thereof to each of such of my said six nieces as shall be living . . . at the time of" the death of "the survivor of my said wife and son, for and during the respective lives of my said nieces, and, from and after the decease of my said six nieces, to stand possessed of my said trust estate and the income thereof," upon trust for such children of the testator's son as should be living at the son's death. Three only of the six nieces survived the testator's widow and son, and these three were all living. The son left one child him surviving:—

*Held*, that as each niece died, her share of the income did not belong to her legal personal representative until the death of the last surviving niece, and did not go over to the surviving nieces or niece, and that there was not an intestacy as to such share of income until the death of the last surviving niece; but that, as each niece died, her share of income went immediately to the remainderman, the son's child. *In re BROWNE'S WILL TRUSTS. LANDON v. BROWN*  
**Sargant J. 690**

**WILL—continued.**

5. — *Charitable Legacies—Declaration that Trustee shall decide any Question of Disputed Identity—Jurisdiction of Court—Latent Ambiguity—Evidence of Intention—Will—Construction.*

Testator gave certain charitable legacies—including a legacy of 1000*l.* to "The National Association for the Prevention of Consumption"—and the testator directed that "if any doubt shall arise in any case to the identity of the institution intended to benefit the question shall be decided by my trustees whose decision shall be final and binding on all parties." There was no society of that name merely, but there was a society whose full name was "The National Association for the Prevention of Consumption and other Forms of Tuberculosis." There was also an independent branch of this association whose full name was "The Leicester and Leicestershire Branch of the National Association for the Prevention of Consumption and other Forms of Tuberculosis" to which the testator had been a subscriber, and in whose favour extrinsic evidence of intention was sought to be given. Both the trustees and the Leicester and Leicestershire Branch were desirous that the question of identity should be finally decided by the trustees. The National Association insisted on having the decision of the Court:—

*Held*, that the direction in the will so far as it purported to oust the jurisdiction of the Court was void and inoperative (1.) on the ground of repugnancy and (2.) as being contrary to public policy. *Massy v. Rogers* (1883) 11 L. R. Ir. 409 approved and followed.

*Held*, also, that extrinsic evidence of intention was inadmissible and that the National Association was entitled to the legacy. *In re RAVEN. SPENCER v. NATIONAL ASSOCIATION FOR THE PREVENTION OF CONSUMPTION AND OTHER FORMS OF TUBERCULOSIS AND REGINALD PRATT* — — — **Warrington J. 673**

6. — *Charitable Legacy—Debentures of Australian Land Company—Floating Security—Office in London—"Interest in land" in England of no value—Apportionment—Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), ss. 4, 10.*

A testator who died in 1891 bequeathed, after a life interest, so much of his residuary personal estate as was by law applicable to charitable legacies to two charities. Part of his residuary estate at his death consisted of 3000*l.* secured by the debentures of an Australian land company which were a charge upon all the real and personal assets of the company. The only property in England possessed by the company was some furniture and a leasehold office in London of no appreciable value. By the law of Australia money charged on land could be validly given by will to charitable purposes:—

*Held*, that the debentures did not pass to the charities.

Decision of Neville J. [1915] 1 Ch. 168 affirmed.

*In re Hill's Trusts* (1880) 16 Ch. D. 173 overruled. *In re DAWSON. PATTISSON v. BATHURST* — — — **C. A. 626**

**WILL—continued.**

7. — *Charitable Legacy—Gift to Vicar and his Successors—Condition—Repair of Tombstones—Gift over on default in repairing to Non-charitable Object—Perpetuities—Police "Superannuation Fund"—Police "Pension Fund"—"Police Authority"—Parties—Police Act, 1890 (53 & 54 Vict. c. 45), ss. 1, 2, 7, 16, 18, 19, 22, 30, 33, 36; Scheds. I., III.*

A testator who died in 1914 by his will gave 50*l.* to the vicar of C. and his successors to be invested in trust security, and committed to their care and charge certain graves in the churchyard of C., "the same to be kept in good order and repair" with a gift over of the trust fund "if the said vicar and his successors shall at any time fail to comply with these directions" to "the superannuation fund of the Cardiganshire Constabulary." There was no such fund, but the testator, as a retired member of the Cardigan Constabulary, had for many years received a pension paid by the Cardigan County Council under the provisions of the Police Act, 1890, which (ss. 1, 2, and 16) established a "pension fund" for the members of every police force or their dependants on retirement of a member or on his death whilst in the force; s. 22 provides that, if the assets of the pension fund should exceed the amount required for meeting the liabilities thereon, the Secretary of State may by a provisional order authorize payments out of the pension fund "for such purposes . . . as may seem expedient"; and s. 33 and the Third Schedule to the Act define the "police authority" of a county to be "the standing joint committee of the quarter sessions and the county council." On an originating summons to determine the validity of the above bequests:—

*Held*, that the Cardigan County Council sufficiently represented the police authority of that county for the purposes of the summons.

*Held*, also, that there was a good gift of the income of the 50*l.* to the vicar and his successors as an accretion to the endowment of the living.

*Held*, also, that the testator had not sufficiently described the police "pension fund" as the object of the gift over; but if he had, that fund was not wholly a charity, and therefore the gift over on failure to repair the graves was void under the rule against perpetuities. *In re DAVIES. LLOYD v. CARDIGAN COUNTY COUNCIL* — — — **Neville J. 543**

8. — *Chattels—Legal Limitations to Life Tenant and Remainderman—Death of Tenant for Life—Chattels lost or injured—Claim for Compensation by Remainderman—Tort—"Actio personalis moritur cum persona"—Trustee or Bailee—Liability of Estate of Tenant for Life.*

Testatrix specifically bequeathed her jewellery and lace to her daughter, with remainder in the event (which happened) of her daughter dying childless to testatrix's son, and appointed them her executor and executrix. On the testatrix's death in 1895 the daughter took possession of the jewellery and lace. She died in 1913, when some of the articles were found to have been broken up by her and others were missing. The son made a claim for compensation out of the daughter's estate, which her executor resisted on



**WILL**—*continued*.

the ground that the claim was based on tort and merely personal:—

*Held*, that as possessor of the articles the daughter was in the position of trustee or bailee for the remainderman, and he was therefore entitled to recover by way of compensation out of her estate the amount necessary to restore or replace the articles.

The suggestion relating to chattels settled by way of legal limitations in *Fearne on Contingent Remainders*, 10th ed. vol. i. p. 414, namely, that on the executor's assent to the possession of the first taker the latter may "be considered as taking it in trust for the ulterior legatees, subject to his own anterior beneficial interest therein," approved and adopted. *In re SWAN*. WITHAM *v.* SWAN — — — **Sargant J. 829**

9. — *Devise before Wills Act—Legal Estate to Trustee in Fee Simple—Trust for A. in Fee Simple with Gift over in Case of his Death "unmarried" and without Issue—Gift over without Words of Limitation—Extent of Defeasance.*

T., who died in 1828, by his will devised real estate to a trustee and his heirs in trust for his sister (who died in 1841) during her life, and after her death in trust for his nephew James, his heirs and assigns, but if James should die "unmarried and without lawful issue" then in trust for testator's niece Sarah during her life, and after her death in trust for her children living at her death, share and share alike, who should attain the age of twenty-one years being boys, or being girls should attain that age or be married, with benefit of survivorship between them.

In 1858 James married a wife who died in his lifetime. He never had any issue. He died in 1893, having made a will disposing of his real estate. Sarah died in 1864 leaving children who attained the age of twenty-one, the last survivor of whom died in 1900.

The question was whether the property devolved under the gift over contained in T.'s will or under the will of James. Down to 1914 the devolutions of the property were such that the same persons were entitled to possession on either hypothesis:—

*Held*, that James took an equitable estate in fee simple defeasible in the event of his death without leaving a widow or issue, the collocation of the words "without lawful issue" showing that the word "unmarried" was used not in its primary sense of "without ever having been married," but in its secondary sense of "without leaving a widow."

*In re Sanders' Trusts* (1866) L. R. 1 Eq. 675 and *In re Chant* [1900] 2 Ch. 345 followed.

*Heywood v. Heywood* (1860) 29 Beav. 9 and *Roberts v. Bishop of Kilmore* [1902] 1 I. R. 333 distinguished.

*Held*, also, that the gift over in T.'s will only divested the equitable estate in fee simple previously given to James so far as was necessary to give effect to the subsequent interests given to Sarah and her children.

*Gatenby v. Morgan* (1876) 1 Q. B. D. 685 followed.

**WILL**—*continued*.

*Held*, also, that under the old law before the Wills Act, 1837, the subsequent interests given by T.'s will to the children of Sarah created equitable estates for life only, the rule that the estate of a cestui que trust is commensurate with the estate of his trustee being inapplicable to the case for the reason that the equitable estate in fee simple given to James required in any case a corresponding legal estate in the trustee, and that the title to the property in the events which had happened must now be traced under the will of James.

*Challenger v. Sheppard* (1800) 8 T. R. 597 and *Moore v. Cleghorn* (1847) 10 Beav. 423; on appeal (1848) 12 Jur. 591, distinguished. *In re JONES*. LAST *v.* DOBSON — **Sargant J. 246**

10. — *Hotchpot Clause—Moneys covenanted to be paid in certain Events to be brought in "in default of any direction to the contrary in writing"—Annual Allowance covenanted to be paid in Settlement directing that the same is not to be taken in satisfaction of Donee's Share under Will.*

Under a will and codicil children of the testator were given shares in his residuary estate. The will provided that moneys which the testator had given or covenanted to give to any child "on his or her marriage or otherwise for his or her advancement or establishment in life" should "in default of any direction to the contrary in writing under my hand" be taken in or towards satisfaction of the child's share and "brought into hotchpot and accounted for accordingly." On the subsequent marriage of a child, testator, in the child's marriage settlement, covenanted to pay to the settlement trustees an annual sum of 300*l.* during the joint lives of himself and other persons, and by the settlement declared that the sums payable under the covenant should "not be taken in satisfaction of any share" which the child might take in the testator's residuary estate under his will. Testator afterwards made a second codicil confirming his will:—

*Held*, (1.) that the hotchpot clause was not invalid as being in conflict with the Wills Act, 1837, inasmuch as its words might be reasonably construed as requiring to be brought into hotchpot only sums answering a particular description, namely, sums advanced free of certain conditions; (2.) that the moneys paid under the covenant had a condition attached to them and were not subject to the hotchpot clause; and (3.) that this construction was made clearer by the second codicil.

*Quære*, whether an allowance such as was covenanted to be paid is within a hotchpot clause in the form before the Court. *In re ARBUTHNOT*. ARBUTHNOT *v.* ARBUTHNOT **Sargant J. 422**

11. — *Indefinite Gift of Net Profits of Commercial Undertakings—Shares in Limited Company—Advances—Interest in Partnership—Will—Construction.*

Testator bequeathed to a legatee one fifth share of the "net profits in all my commercial undertakings, being John Bennett Lawes &



**WILL—continued.**

Company, Limited, the Millwall Rubber Company, Limited, and the X Rubber Company."

The first two undertakings were limited companies in each of which the testator held shares and to each of which he had made advances. The third was a verbal partnership two third shares in which belonged to the testator. Since his death the terms had been reduced to writing, under which his executors were to carry on the partnership business and were to receive two thirds of the profits till sale and two thirds of the purchase-moneys on sale of the partnership assets:—

*Held*, that the legatee was not entitled to any part of the advances made by the testator.

*Held*, also, that, as to the testator's shares in the two limited companies, the rule that a gift of income without any limit of time is equivalent to a gift of the capital applied, and that the legatee was entitled to one fifth part of the testator's shares.

*Held*, also, that, as to the testator's interest in the partnership, that rule was inapplicable, and that the legatee was only entitled to one fifth share of the net profits receivable by the executors while the partnership business was being carried on, and not to any share of the partnership assets. *In re LAWES-WITTE-WRONGE*. MAURICE v. BENNETT

**Warrington J. 408**

**12. — Legacies for Life—Capital to fall into Residue—Deficiency of Estate—Administration—Legates treated as Annuitants—Form of Order—Will—Construction.**

Testator (after giving pecuniary legacies which had priority and were provided for) gave the residue of his property upon trust to pay the income of eight specified sums to eight persons respectively for life, each capital sum on the death of each of four of the legates to fall into the ultimate residue, the other four sums being settled. The estate was insufficient to provide the eight sums:—

*Held*, that, on the authority of *Arnold v. Arnold* (1835) 2 My. & K. 365, 374, the four legates, the capital of whose legacies was at their respective deaths to fall into residue, ought to be treated as annuitants; that, in accordance with the rule in *In re Cottrell* [1910] 1 Ch. 402, their annuities and the other four legacies ought to be put on a level and abate rateably; and that, accordingly, the annuities must be valued as at a year from the testator's death and the four amounts so ascertained must be treated as pecuniary legacies, and each of those amounts and of the other four legacies must bear its rateable proportion of the total abatement. *In re RICHARDSON*. RICHARDSON v. RICHARDSON

**Eve J. 353**

**13. — Legacy—Ademption—Bequest for Benefit of Vicar of Parish Church—Bequest expressed to be in Pursuance of Wishes of Testator's Deceased Wife—Subsequent Gift by Deed of Land for same Purpose—Recited to be in Memory of Testator's Wife—Parol Evidence—Admissibility—Codicil confirming Will.**

A. by will, dated December 31, 1904, gave

**WILL—continued.**

500*l.* to trustees upon trust to purchase land to be added to glebe of parish church. The will stated that the bequest was made "in pursuance of the express wish of his wife," who died in 1896.

In 1905 he purchased a piece of land in the parish for 375*l.*, and had it conveyed to trustees to be added to the glebe. The deed recited that the land was so bought and conveyed in memory of the testator's wife. In 1911 the testator made a codicil which gave certain additional legacies and in all other respects confirmed his will; he died in 1913:—

*Held*, that both will and deed clearly expressed the motive and object of the respective gifts, and they were not the same; and that parol evidence was not admissible to vary their construction. There was therefore no ademption.

The Court of Appeal treated the matter as if there were no codicil, but held that it was a fact which could not have been disregarded had they been disposed to hold that there was ademption.

Decision of Joyce J. [1914] 2 Ch. 422 affirmed on different grounds. *In re AYNLEY*. KYRLE v. TURNER — — — **C. A. 172**

**14. — Legal Devise—Strict Settlement—Compendious Form—Construction—Devise to "every son of mine and his issue male in succession, so that" etc.—First Words treated as merely introductory in Subsequent Limitations—Rule in Shelley's Case.**

A testator devised his real estate "unto and to the use of every son of mine and his issue male in succession so that every elder son and his issue male be preferred to every younger son and his issue male and that my grandsons respectively with their respective issue male take in succession according to their respective seniorities and so that every such son and every such grandson who shall be begotten in my lifetime take an estate for his life without impeachment of waste with remainder to his first and every subsequent son successively according to seniority in tail male and that every such grandson who shall be begotten after my death take an estate in tail male" with remainder over.

On the testator's death his eldest son succeeded to the estate and subsequently died without executing any disentailing assurance, leaving his only son, the plaintiff, as his successor. The plaintiff was born in the testator's lifetime:—

*Held* by Astbury J. and the Court of Appeal, that the initial words of the devise were not intended to confer any estate on any one but were merely introductory to the effective limitations that followed, and consequently the plaintiff and his father before him were only life tenants.

*In re Simcoe* [1913] 1 Ch. 552 distinguished. *In re LORD LAWRENCE*. LAWRENCE v. LAWRENCE — — — **C. A. 129**

**15. — Perpetuity—Remoteness—Gift to Husband of Spinster for Life with Remainder to her Children.**

A testator directed the trustees of his will to pay a third of the rents and profits of his

**WILL—continued.**

residuary real estate to his niece I. B. (who was then a spinster) for life, and after her death to pay the same to any husband with whom she might intermarry, and who should survive her, during his life, and after the death of both to sell the estate, and hold the proceeds of one-third in trust for the children of I. B. attaining twenty-one, and if the said I. B. should die without leaving a child or there should be no child of the said I. B. who should attain a vested interest then in trust for the children of S. I. B. married but died without having had issue :—

*Held*, (1.) that the original gift in favour of the children of I. B. was not void as infringing the rule against limiting land to an unborn person for life (a husband who might be unborn at the date of the creation of the limitations) with a remainder limited so as to confer an estate by purchase on that person's issue; and (2.) that, even if the original gift had been void, the gift to the children of S. was good as an alternative and severable gift.

*In re Park's Settlement* [1914] 1 Ch. 595 not followed.

*In re Frost* (1889) 43 Ch. D. 246 explained.

Observations on *Whitting v. Whitting* (1908) 53 Sol. J. 100. *In re BULLOCK'S WILL TRUSTS*. *BULLOCK v. BULLOCK* - - Sargant J. 493

**16. — Real Estate—Tenant for Life—Trust of “as well the income as the corpus” in Remainder to Children who attain twenty-one or marry—Death of Tenant for Life leaving Infants—Destination of Rent till and after a Child attained twenty-one.**

Testator, who died in 1904, specifically devised real estate to trustees upon trust to permit his daughter to receive the income thereof during her life, and from and after her decease then “as well the income as the corpus” upon trust as she should by will appoint, and, in default of such appointment and so far as the same should not be disposed of by her will, in trust for all her children who being sons should attain the age of twenty-one years or being daughters should attain that age or marry in equal shares; and as to the residue of his real and personal estate gave the same upon trust for his widow during her life and after her death upon certain trusts in favour of his children.

The daughter died intestate in December, 1913, leaving six children, the eldest of whom attained twenty-one in December, 1914. Her other children were all infants and unmarried :—

*Held*, that the words “as well the income as the corpus” expressed an intention on the part of the testator to dispose of the income together with the corpus as from the day of the death of the tenant for life, and that each of the six children would be entitled to an equal share of the rents from that date if and on becoming entitled to a corresponding share of the corpus.

*In re Averill* [1898] 1 Ch. 523 distinguished.

*Per Sargant J.*: If the intermediate rents accruing before the eldest child attained a vested interest had fallen into the residue they would have been payable to the tenant for life

**WILL—continued.**

of the residue as income. *In re STEVENS*. *STEVENS v. STEVENS* - - Sargant J. 429

**17. — Residue to be at Discretion of Executor and at his own Disposal—Absence of Trust—Sole Executor—Prior Legacy in Will to Executor—Executor, whether entitled beneficially—Will—Construction.**

Testatrix by her will appointed G. B. her executor, and directed him to pay her debts and funeral and testamentary expenses. She then bequeathed various pecuniary legacies, including a legacy to G. B. “(my executor),” and concluded her will in the following terms :—“After the aforesaid legacies have been duly paid the remainder or residue of my property (if any) shall be at the discretion of my executor and at his own disposal” :—

*Held* (reversing the decision of Warrington J. [1914] 2 Ch. 173), that G. B. took the residuary estate of the testatrix as a beneficiary and not as trustee for the next of kin of the testatrix. *In re HOWELL*. *In re BUCKINGHAM*. *LIGGINS v. BUCKINGHAM* - - - C. A. 241

**18. — Specific Gift of Chattels in France—“Free of legacy duty”—French Mutation Duty—Penalties for Delay in Payment—Incidence of Duty and Penalties.**

Testator, a domiciled Englishman, by his will bequeathed to Lady S. “free of legacy duty” all his pictures, engravings, furniture, busts, silver plate, and “works of art” of every description wheresoever situate, except at his two London houses or except those bequeathed specifically by his will. At his death he was possessed of a number of valuable tapestries which were attached to the walls of his house in Paris, which the Court held, upon the facts, passed to Lady S. under the specific bequest of “works of art.” According to French law a mutation duty was payable by the legatee on these chattels; and if the duty was not paid within eight months of the testator's death certain penalties were incurred. By reason of litigation which arose with reference to the proving of the will and the administration of the estate the French duty was not paid, and Lady S. was not put into possession of the tapestries until two years after the testator's death and heavy penalties for delay became payable to the French fiscal authorities :—

*Held*, (1.) on the construction of the will, that the expression “legacy duty” was used by the testator in its strict legal sense as meaning the duty imposed by the Legacy Duty Act, 1796, and amending Acts, and not as meaning all duties in the nature of legacy duty, and that it did not therefore include the French mutation duty; (2.) that there was no obligation on the executors to pay the mutation duty in order to get possession of the tapestries and deliver them to the legatee, and consequently that the mutation duty must be borne by the legatee; (3.) that the penalties were in substance an extra mutation duty and must also be paid by the legatee.

Decision of Warrington J. [1914] 1 Ch. 847 affirmed.

**WILL—continued.**

*Peter v. Stirling* (1878) 10 Ch. D. 279 distinguished. *In re SCOTT. SCOTT v. SCOTT*  
C. A. 592

19. — *Tenant for Life and Remainderman—Trust for Conversion—Power to postpone—Power to retain—“Stocks, funds or securities”—Shares in Canadian Land Company—Wasting Securities—Income in Specie.*

A testator by clause 6 of his will gave all his real and personal estate to trustees upon trust for sale and conversion and to hold the net proceeds as to one moiety upon trust to invest and pay the income to his wife during widowhood, with a gift over, and as to the other moiety upon trust to invest and pay the income to his two daughters for life as tenants in common, with gifts over; clause 9 empowered the trustees to postpone the sale and conversion of all or any part of the estate for so long as they thought fit; and clause 11 empowered the trustees to permit his personal estate invested at his decease upon “any stocks, funds or securities whatsoever yielding income to continue in the same state of investment” so long as they should think fit.

The testator at his death held shares in Canadian land companies which were valuable and paid good dividends, but were of a wasting character and did not come within the investment clause in the will:—

*Held*, on the evidence, that the shares were “stocks” within the meaning of that word in clause 11.

*Held*, also, that under clause 11 the trustees could retain the shares, and that the tenants for life were entitled to receive in specie all the dividends from the shares.

*In re Chaylor* [1905] 1 Ch. 233 distinguished.  
*In re INMAN. INMAN v. INMAN*

Neville J. 187

20. — *Trust—Life Interest—Provision against Alienation—Income accruing but not received by Trustees at Date of Alienation—Apportionment Act, 1870 (33 & 34 Vict. c. 35), s. 2.*

A testator gave a share in his estate to trustees upon trust to pay the income thereof to his son for life, but directed that any income for the time being payable to him “shall only be paid to him so long as he shall not attempt to assign or charge the same.” The son by deed purported to assign his life interest by way of mortgage to secure money lent. At the date of the mortgage the trustees had in their hands a sum of 356*l.* representing income of the son's share received by them before that date, and they subsequently received a sum of 393*l.* representing income of the share received by them after the date of the mortgage, of which sum 254*l.* represented the apportioned part up to that date:—

*Held*, that the Apportionment Act, 1870, did not apply; that the effect of the clause was to prevent the destination of the income being finally determined until it had actually accrued, i.e., become payable to the tenant for life; and that, although the son or his mortgagee was entitled to the 356*l.*, neither of them was entitled to the 254*l.*

**WILL—continued.**

*In re Sampson* [1896] 1 Ch. 630 applied. *In re JENKINS. WILLIAMS v. JENKINS*  
Sargant J. 46

21. — *Ultimate Gift over after Gifts void for Remoteness—Alternative and Independent Gift—“Without leaving issue as before mentioned”—Meaning—Will—Construction.*

The testator made certain provision out of part of his residuary estate for his nephew R. D. during his life, and as to all the residue gave the same upon trust for the first son born of the body of R. D. as should live to attain twenty-one (provided such son should be christened John or should assume the name of John Davey), the whole of the capital to be paid to him on attaining twenty-one, and in default of any such son upon trust for the first son born of the body of either of the daughters of R. D. who should attain twenty-one (provided as aforesaid), and in default of any such son of a daughter then in trust as to one half of the capital for the first daughter of R. D. who should have attained twenty-one, her executors and administrators, and as to the other half for charities, “and in case of the death of the said R. D. without leaving lawful issue as before mentioned then as to the whole thereof” upon trust for certain charities.

R. D. died without ever having had a child, and his next of kin and heir-at-law claimed his residuary estate on the ground that the ultimate gift to charities was void for remoteness:—

*Held*, (1.) that the trusts for the first son of a daughter of R. D. who attained twenty-one and in default for the first daughter of R. D. who should have attained twenty-one were void for remoteness;

(2.) (per Lord Cozens-Hardy M.R. and Joyce J.) that although “without leaving” might be construed as meaning “without having” in cases where such a construction was necessary in order to obviate the divesting of an otherwise actually vested interest, yet such a construction was not admissible in the present case for the sole purpose of rendering the ultimate gift over to the charities void for remoteness;

(3.) that “issue as before mentioned” meant nothing further than before mentioned issue (i.e., a son, a son of a daughter, or a daughter), and did not import as well the qualifications by majority or name attached to the vesting of their original gifts; and

(4.) that the ultimate trust for the charities was an alternative and independent gift upon an event ascertainable at the death of R. D., and was good.

Attention called to errata in the report of *In re Cobbold* [1903] 2 Ch. 299 (see [1915] 1 Ch. 847, n.).

Decision of Astbury J. affirmed. *In re DAVEY. PRISK v. MITCHELL* — — — C. A. 837

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